IN THE

Supreme Court of the United States

October Term, 1967

No. 645

JOSEPH LEE JONES and BARBARA JO JONES,

Petitioners,

v.

ALFRED H. MAYER COMPANY, a corporation, ALFRED REALTY COMPANY, a corporation, PADDOCK COUNTRY CLUB, INC., a corporation, ALFRED H. MAYER, an individual, and an officer of the above corporations,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* AND APPENDIX FOR NATIONAL COMMITTEE AGAINST DISCRIMINATION IN HOUSING, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH AND THE AMERICAN JEWISH CONGRESS

SOL RABKIN
National Committee Against Discrimination in Housing
323 Lexington Avenue
New York, New York 10016

ROBERT L. CARTER
National Association for the Advancement of Colored People
1790 Broadway
New York, New York 10019

JOSEPH B. ROBISON
American Jewish Congress
15 East 84th Street
New York, New York 10028

ARNOLD FORSTER
Anti-Defamation League of B'nai B'rith
315 Lexington Avenue
New York, New York 10016

Attorneys for Amici

ABRAHAM H. FOXMAN
PAUL HARTMAN
HAROLD D. SHAPIRO
BEVERLY COLEMAN
ALEXANDER KOLBEN
Of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Statutes:

Other Authorities:

PAGE

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Interest of the *Amici*

This brief is sponsored by four national organizations which have long been deeply involved in and concerned with the danger to our democracy arising out of discrimination

and segregation in housing. All have been involved in education and litigation aimed at strengthening the machinery for combatting this evil badge of slavery. The National Committee Against Discrimination in Housing, The National Association for the Advancement of Colored People, The Anti-Defamation League of B'nai B'rith and the American Jewish Congress are united on the need for insuring that government and private programs affecting housing do not extend and indurate existing patterns of racial segregation in housing.

The harsh fact is that the pattern of black ghettos in our major cities is spreading rather than abating and the growing rings of lily-white suburbs which enclose our central cities make it clear that there is an increasing urgency in the need for mobilization of every force of government as well as of private industry to deal with the problem. Watts, Hough, Rochester, Harlem, Bedford-Stuyvesant have joined with other racial ghettos to make clear the imperative need for speedy federal action to help break down the walls of housing prejudice and discrimination which have brought about these explosions of violence and hatred. The federal devices which are at hand must be used now. Builders of white suburban communities must not be allowed to spread the plague of housing segregation, a plague which endangers the very roots of our free democracy, simply because their state has failed to adopt fair housing legislation and they have elected to eschew use of federal aids in order to keep their newly built housing projects "exclusive." Every such action by a private builder lays the base for more Wattses.

The organizations sponsoring this brief believe that since 1866 there has been a federal law which bars racial discrimination in the sale or lease of real property. They believe that law must be enforced if we are to begin to move forward in preserving our democracy, in implementing the promise of equality of opportunity which is a fundamental aspect of the American dream.

The *amici* are indebted to Kenneth B. Clark, Isidore Chein and Professor Stephen Berger for invaluable aid in providing them with the material contained herein on the psychological and sociological impact of racial segregation in housing on those immured in our racial ghettos. They wish also to acknowledge the help provided, in addition to those listed on the brief, of Robert Van Lierop of the NAACP who assisted in the legal research on which the brief is based.

Opinions Below

The opinion of the Court of Appeals (A.43a-66a)* is reported at 379 F. 2d 33. The memorandum opinion of the District Court for the Eastern District of Missouri is reported at 225 F. Supp. 115 (A 15a-41a).

Jurisdiction

The judgment of the Court of Appeals was entered on June 26, 1967. The petition for writ of certiorari was filed on September 22, 1967, and granted on December 4, 1967. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

* References to the Appendix containing the relevant entries in the proceeding below, the relevant pleadings and opinions below and the judgment and decision below, are designated by A.

Constitutional Provisions and Statutes Involved

Sections 1 and 2 of the Thirteenth Amendment to the Constitution.

Sections 1 and 5 of the Fourteenth Amendment to the Constitution.

The Civil Rights Act of 1866, Act of April 9, 1866, ch. 31, 14 Stat. 27, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 18 of the Enforcement Act of May 31, 1870 (Civil Rights Act of 1870), ch. 114, 16 Stat. 144, codified in Title 42, U.S.C., Secs. 1981 and 1982.

Sec. 1 of the Enforcement or Anti-Lynching or Ku Klux Klan Act of April 20, 1871 (Civil Rights Act of 1871), ch. 22, 17 Stat. 13, codified in Title 42, U.S.C. Sec. 1983.

All these are set forth in the appendix hereto (*infra,* pp. 105-115).

Questions Presented

1. Does Section 1982 of Title 42 of the United States Code, derived from the Civil Rights Act of 1866, prohibit racial discrimination in the sale or lease of real property and, if so, is this section constitutional?

2. Is there sufficient state action by respondents demonstrated by the allegations in the complaint herein to establish violation of the equal protection clause of the Fourteenth Amendment?

Statement of the Case

This case was filed in the United States District Court for the Eastern District of Missouri seeking relief under the Civil Rights Acts of 1866, 1870 and 1871, codified in 42 U.S.C. Secs. 1981, 1982 and 1983, and under the Thirteenth and Fourteenth Amendments to the Constitution directly. The District Court had jurisdiction of the cause under 42 U.S.C. Sec. 1983 and 28 U.S.C. Secs. 1331, 1337 and 1343.

Inasmuch as this case arises from the affirmance by the Court of Appeals (A. 66a) of the order of the District Court (A.14a.) sustaining the respondents' motion to dismiss petitioners' first amended complaint for failure to state a claim upon which relief could be granted (A. 14a), the facts pleaded by petitioners in their first amended complaint (A. 3a-13a) must be taken as true.

Petitioners Joseph Lee Jones and Barbara Jo Jones are husband and wife who, in June of 1965, answering an advertisement in the St. Louis Post-Dispatch, went to a subdivision known as Paddock Woods in St. Louis County, Missouri, in order to consider the purchase of a lot and home. After inspecting the display houses, petitioners decided that a particular type of home was well suited to their needs, convenient to their places of employment with agencies of the Government of the United States, and within their ability to pay (A 5a-7a, 12a).

Paddock Woods is a subdivision which includes more than 100 projected homes with more plots to be opened, owned and developed by the Alfred H. Mayer Company, a corporation in the business of developing subdivisions in St. Louis County, including not only Paddock Woods, but

neighboring subdivisions known as Paddock Estates, Paddock Meadows and Wedgewood. The ultimate result will be that Paddock Woods will be a suburban community of about a thousand people "living in an area chosen by defendants for development, residing in homes designed and built by defendants, driving on streets built by defendants" (A. ~~10a~~). Paddock Woods will be part of a larger community which will include similar adjacent developments built by the same developer which will house approximately 2,700 families. It will contain recreational facilities built by the developer for all these communities, a golf course and a tennis and bath club for the use, primarily, of the residents. Alfred Realty Company is a corporation licensed as a real estate broker by the State of Missouri which is the exclusive sales agent for the homes in these subdivisions. Alfred H. Mayer, also licensed as a real estate broker by the State of Missouri, owns a controlling interest in and is the managing officer and guiding policy maker of both Alfred H. Mayer Company and Alfred Realty Company. Paddock Country Club, Inc., is a corporation controlled by the other respondents, which operates a golf course for the use of residents of the "Mayer" subdivisions (A. 3a-5a, 9a-12a). The respondents will be referred to hereinafter at times simply as "the developers".

After petitioners Joseph and Barbara Jones had picked out a lot and home in Paddock Woods which they wished to order and purchase, the respondents refused to sell them the house and lot because of the fact that Joseph Jones is a Negro, and because it is the respondents' general policy not to sell said houses and lots to Negroes (A. 7a).

Summary of the Argument

Section 1982 of Title 42 of the United States Code which guarantees to all citizens of the United States the same right as white citizens to inherit, purchase, lease, sell, hold and convey real and personal property is a portion of Section 1 of the Civil Rights Act of 1866. It was enacted soon after the Thirteenth Amendment which forever barred slavery and involuntary servitude in the United States, and two years before the Fourteenth Amendment.

The Thirteenth Amendment, which specifically authorized Congress to enact appropriate legislation for its enforcement was not intended to, nor did it by its terms, deal only with state action. When it was enacted and adopted it was viewed by those who had approved it, as abolishing not just enforced service of one person for another but as a guarantee to all citizens, including the emancipated Negroes, of the outlawing of all of the badges and incidents of slavery and a declaration that all citizens were free men protected by the federal power in their possession of the fundamental rights necessary for a life of freedom. These fundamental rights included the right to purchase and hold real and personal property free from discrimination based on race or previous condition of servitude.

The debates in the Congresses which enacted the Thirteenth and Fourteenth Amendments and the Civil Rights Act of 1866 demonstrated that the framers of the Amendment and the Act clearly intended the guarantees and protections of both to operate not only against state action but also against private action aimed at denying or limiting the rights protected by those provisions. The plain and literal language of the Act itself also demontrates this purpose.

The Act has as its constitutional basis the specific authority granted to Congress in Section 2 of the Thirteenth Amendment as well as the implied powers needed to effectuate that amendment's goal. Its reenactment as Section 18 of the Civil Rights Act of 1870 gives it the additional constitutional authority of Section 5 of the Fourteenth Amendment which six judges of this Court have recently said authorizes congressional legislation directed against private action interfering with Fourteenth Amendment rights. *United States* v. *Guest*, 383 U.S. 745 (1966).

The reenactment of the Civil Rights Act of 1866 as a portion of the Civil Rights Act of 1870 was a reassertion by Congress of the need for and the constitutional validity of the 1866 Act, not intended or understood by Congress as in any way limiting its coverage or applicability. Those decisions which, in dicta, interpret the 1870 reenactment as limiting the 1866 Act to state action are in error. Similarly, nothing in Section 1983 of Title 42 of the United States Code or in its predecessor statutes justifies the conclusion reached by the trial court that that section spells out the sole and exclusive remedy for breach of the rights protected in Section 1982.

Racial segregation in housing is an immediate and pressing evil which, through denial of the right to purchase and hold real property free of racial discrimination, protected by Section 1982 against denial by any source, perpetuates one of the most onerous of the badges and incidents of slavery. This Court, which has never ruled on the specific issue of the applicability of this provision of the 1866 Act to private action, should now declare that the Act means what it says and is constitutionally applicable to bar racially discriminatory sales of real property.

At the very least, this Court should find that, in the facts alleged by the complaint here under consideration, there is sufficient state action to require a ruling that the complaint states a cause of action under the Fourteenth Amendment. The involvement of the state in many aspects of the respondents' operations and the fact that respondents are performing the state function of establishing and governing a community and are using licenses granted by the state in the exercise of its public power to protect the public welfare, satisfies the state action requirement.

POINT I

Section 1982 of Title 42 of the United States Code, part of the Civil Rights Act of 1866 enacted under the authority of the Thirteenth Amendment, prohibits racial discrimination in the sale or lease of real property.

A. History of Section 1982

Section 1982 of Title 42 of the United States Code reads as follows:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

It embodies one portion of Section 1 of the Civil Rights Act of 1866 which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all persons born in the United States and not subject to any foreign power, excluding In-

> dians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[1]

This Act followed by less than four months the adoption of the Thirteenth Amendment which had been declared ratified and in force in December 18, 1865. That amendment consisted of two sections. Section 1 abolished slavery. It reads:

> Neither slavery nor involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2 provides:

> Congress shall have power to enforce this article by appropriate legislation.

It was included as part of the amendment, in order "to remove all doubt and argument about the power of Congress" to abolish slavery, not only in name but in fact.[2]

1. Civil Rights Act of April 9, 1866, ch. 31, Sec. 1, 14 Stat. 27 (1866).

2. tenBroek, *Equal Under Law* (1965, Collier Books), at 177.

In explaining why the second section had been included in the amendment, Senator Lyman Trumbull of Illinois, Chairman of the Judiciary Committee, said on December 13, 1865 on the Senate floor:

> And, sir, when the constitutional amendment shall have been adopted, if the information from the South be that men whose liberties are secured by it are deprived of the privilege to go and come when they please, to buy and sell when they please, to make contracts and enforce contracts, I give notice that, if no one else does, I shall introduce a bill and urge its passage through Congress that will secure to those men every one of these rights; they would not be freemen without them. It is idle to say that a man is free who cannot go and come at pleasure, who cannot buy and sell, who cannot enforce his rights.[3]

The Civil Rights Act of 1866 was first passed by Congress in March of 1866. The Thirteenth Amendment had become law on December 18, 1865 abolishing slavery for all time, *Clyatt* v. *United States*, 197 U. S. 207, 217 (1905). When President Andrew Johnson vetoed this Act, both Houses of Congress overrode his veto and it became law on April 9, 1866. The Act declared and vindicated those fundamental rights which appertain to the essence of citizenship and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery, Civil Rights Cases, 109 U. S. 3, 22 (1883).

The Fourteenth Amendment which was approved by Congress in June of 1866 was not ratified and did not become a part of the Constitution until July 28, 1868, more

3. CONG. GLOBE, 39th Cong., 1st Sess. 43 (1865).

than two years after the adoption into law of the Civil Rights Act of 1866. That amendment contained a final Section 5 which was substantially similar to Section 2 of the Thirteenth Amendment reading:

> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

During the third session of the Fortieth Congress in 1869, the Congress approved the Fifteenth Amendment which was declared ratified on March 30, 1870. The first section of that amendment prohibited racial discrimination in voting. The second section, cast in virtually the same language as Section 2 of the Thirteenth Amendment and Section 5 of the Fourteenth, gave Congress power to enact appropriate legislation for its enforcement.

Thereafter, on May 31, 1870, Congress enacted a second Civil Rights Act[4] which dealt primarily with voting rights and also sought to protect the freed men from discrimination. Included in this Act as Section 18 thereof, was a provision reenacting the Civil Rights Act of 1866. This section read:

> *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

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4. Civil Rights Act of 1870, ch. 114, 16 Stat. 144 (1870).

B. The Thirteenth Amendment and "State Action"

A resolution for a constitutional amendment ending slavery was debated in the First and Second Sessions of the Thirty-Eighth Congress. The resolution that became the Thirteenth Amendment was debated and passed in the Second Session. It was approved by the Senate on April 18, 1864 and by the House on January 31, 1865. It was declared ratified and in effect on December 18, 1865.

The debates on the amendment made it clear that both proponents and opponents recognized that it did far more than merely sever the legal relationship of master and slave. Thus Rep. James F. Wilson of Iowa, in submitting the anti-slavery amendment in 1864, described the evils of the slave system in broad terms, saying:

> Legislatures, courts, Executives, almost every person holding political or social power and position in the southern States, were all arrayed on the side of slavery, and what they could not accomplish was turned over to the mob, which, without law, with abuse, indignities, cruelties, and hempen halters, did its work with fearful accuracy and terrible exactness.[5]

He went on

> It is quite time, sir, for the people of the free States to look these facts squarely in the face and provide a remedy which will make the future safe for the rights of each and every citizen.[6]

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5. CONG. GLOBE, 38th Cong., 1st Sess. 1202 (1864).

6. *Ibid.*, at 1203.

Senator Henry Wilson of Massachusetts, later Vice-President under President Grant, said of the same proposal

> If this amendment shall be incorporated by the will of the nation into the Constitution of the United States, it will obliterate the last lingering vestiges of the slave system; its chattelizing, degrading, and bloody codes; its dark, malignant, barbarizing spirit; all it was and is, everything connected with it or pertaining to it, from the face of the nation it has scarred with moral desolation, from the bosom of the country it has reddened with the blood and strewn with the graves of patriotism.[7]

Since the Thirteenth Amendment involved the abolition of a form of private property, affecting deeply the fortunes of many people and striking out of existence millions of property, *United States* v. *Rhodes*, 27 Fed. Cas. 785, 788 (1866), it clearly affected the rights of those individuals who had formerly had and might continue or seek in the future to claim ownership of other human beings as chattels. Hence the relationship it deals with is one between private persons and it cannot be limited to situations involving "state action." There is no need, therefore, to establish "state action" as a condition of triggering the exercise of the rights it created or to invoke federal power and action. Even when this Court in the Civil Rights Cases, *supra*, was establishing "state action" as a prerequisite for invoking the protections of the Fourteenth Amendment and was, therefore, striking down the Civil Rights Act of 1875,[8] it also conceded that the Thirteenth Amendment was not a mere prohibition of State

7. *Ibid.*, at 1324.

8. Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875).

laws establishing and upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States[9] and gave "power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure."[10]

Even in *Hodges* v. *United States,* 203 U. S. 1 (1906), where the majority of this Court reversed a conviction of a group of white men for terrorizing several Negroes to prevent them from working in a sawmill, on the ground that the federal civil rights statutes under which they had been indicted were improperly invoked because they could be invoked only against state action, it was conceded that the Thirteenth Amendment grants Congress power to adopt legislation directed against individual action.[11]

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9. Civil Rights Cases, *supra,* at 20. See also *United States* v. *Harris,* 106 U. S. 629 (1882); *Clyatt* v. *United States, supra.*

10. Civil Rights Cases, *supra,* at 20. See also, Gressman, *The Unhappy History of Civil Rights Legislation,* 50 Michigan Law Rev. 1323, 1324 (1952).

11. *Hodges, supra,* at 14, 16. It is submitted that the conclusion of the majority in that case is hardly one which this Court would reach today. The convicted defendants, white men, were convicted of having conspired to oppress, threaten and intimidate a group of Negroes to prevent them from working under contract at a sawmill. The majority struck down the indictment as exceeding the federal power in that it struck at private actions of individuals and not state action. It concluded that when Congress gave the freedmen citizenship it did not extend federal protection to them because it believed "that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes." At 20. History has shown how well the freedmen and their descendants have fared by "taking their chances with other citizens in the States" where they have lived. This decision is discussed below more fully at 18-20.

It is clear, therefore, that the Thirteenth Amendment cannot and has not ever been held by this Court to be limited to dealing with state action.

C. The Scope and Purpose of the Thirteenth Amendment

Examination of the debates in Congress demonstrates that the Thirteenth Amendment which, as has just been shown, unquestionably applies to individual conduct, was intended and understood by its framers and the Congress which approved it and submitted it to the states for ratification, as outlawing the institution of slavery and granting to Congress the power to bar any form of conduct, private or public, which maintained the institution in fact even though it was barred in law. The slavery to be abolished by the amendment was to include all of the incidents of the system which impaired and destroyed the civil rights of white persons. Both the supporters and opponents of the amendment assumed and declared that it went beyond the mere outlawry of personal bondage and guaranteed the emancipated Negro certain minimum rights which Congress would be enabled by the second section to safeguard and protect by legislation.[12] The remarks of Senators Trumbull and Wilson to this effect have been noted above. Jacobus tenBroek summarized similar remarks by other members of Congress on both sides of the issue during the debates on the amendments and the Civil Rights Act of 1866:[13]

> Beyond toppling over the corpse of slavery, most if not all the elements of congressional opposition asserted that the amendment would guarantee to the

12. Gressman, *supra*, fn. 10, at 1324-1325.

13. tenBroek, *supra*, fn. 2, at 162-63.

emancipated Negro a basic minimum of rights—equality before the Law, protection in life and person, opportunity to live, work and move about—and that Congress would be empowered to safeguard and protect those rights * * *

The case made out by the sponsors and supporters of the Thirteenth Amendment was no less explicit on this central issue. The amendment was presented not as one step in a series of steps yet to come, not as an act of partial fulfillment, not as the opportunistic achievement of a limited objective. It was exultantly heralded as "the final step," "the crowning act," "the capstone upon the sublime structure," the joyous "consummation of abolitionism." To the proponents of the amendment, though slavery was dead, the remote contingency of its resurrection had to be precluded; the incidents of slavery had yet to be obliterated; the emancipated Negro and his white friends had to be protected in the privileges and civil liberties of free men; and the federal power as the instrument for achieving these purposes had to be permanently assured * * *"

It is clear from the foregoing that the members of the 38th Congress who approved the Thirteenth Amendment believed that it would outlaw forever slavery and all of its indicia and attributes and that all free men would henceforth be guaranteed the fundamental rights needed for a life of freedom, equality before law, security of person and property, and the right to live and work and move about without check. And the second section of the amendment provided, accordingly, that Congress had and would exercise the power to enforce the constitutional guarantee.[14]

14. Howe, *Federalism and Civil Rights,* Civil Rights, The Constitution, and the Courts (1967, Harvard University Press), 30 at 46.

Reference is made above to the views expressed by opponents of the Thirteenth Amendment. This is done because it helps demonstrate that those who in the later debates on the Fourteenth and Fifteenth Amendments and the Civil Rights Acts of 1866, 1870 and 1871, insisted that the Thirteenth Amendment accomplished no more than to end the legal tie between master and slave and to outlaw involuntary servitude, were doing so only in order to seek to undermine and destroy the effect of that amendment and minimize or nullify the impact of the legislation and later amendments adopted to protect and implement what it sought to do. When they opposed it on the ground that it did precisely what its proponents wanted it to do, they necessarily cast doubt on the good faith of their efforts to read it narrowly, when they opposed further steps to carry out its mandate and purpose.

Despite the foregoing clear legislative history, this Court saw fit to accept the view of the opponents of the Thirteenth Amendment in at least two decisions, *Hodges* v. *United States, supra,* and *Corrigan* v. *Buckley,* 271 U. S. 323 (1926). In *Hodges, supra,* at 16, this Court said, "The meaning of this [the Thirteenth Amendment] is as clear as language can make it. The things denounced are slavery and involuntary servitude, and Congress is given power to enforce that denunciation. All understand by these a condition of enforced compulsory service of one to another." And in *Corrigan, supra,* at 330, this Court said, "The Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race."

But both of these cases are of doubtful validity today. *Corrigan* has been distinguished by this Court in *Hurd* v. *Hodge*, 334 U. S. 24, 28-29 (1948), when it reached a conclusion with respect to court enforceability of racial restrictive covenants diametrically opposed to that reached in *Corrigan*.

It is respectfully submitted that the views expressed in dissent by the first Mr. Justice Harlan in *Hodges, supra*, are far more consistent with the action of this Court in recent years, than the view expressed by the majority therein. Dealing with the question of the scope and meaning of the Thirteenth Amendment he said at 26-27:

> Before the Thirteenth Amendment was adopted the existence of freedom or slavery within any State depended wholly upon the constitution and laws of such State. However abhorrent to many was the thought that human beings of African descent were held as slaves and chattels, no remedy for that state of things as it existed in some of the States could be given by the United States in virtue of any power it possessed prior to the adoption of the Thirteenth Amendment. That condition, however, underwent a radical change when that Amendment became a part of the supreme law of the land and as such binding upon all the States and all the people, as well as upon every branch of government, Federal and State. By the Amendment it was ordained that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction"; and "Congress shall have power to enforce this article by appropriate legislation." Although in words and form prohibitive, yet, in law, by its own force, that Amendment destroyed slavery and all its

incidents and badges, and established freedom. It also conferred upon every person within the jurisdiction of the United States (except those legally imprisoned for crime) the right, *without discrimination against them on account of their race, to enjoy all the privileges that inhere in freedom.* It went further, however, and, by its second section, invested Congress with power, by appropriate legislation, to enforce its provisions. To that end, by direct, primary legislation, Congress may not only prevent the reestablishing of the institution of slavery, pure and simple, but may make it impossible that any of its incidents or badges should exist or be enforced in any State or Territory of the United States. It therefore became competent for Congress, under the Thirteenth Amendment, to make the establishing of slavery, as well as all attempts, whether in the form of a conspiracy or otherwise, to subject anyone to the badges or incidents of slavery *offenses against the United States,* punishable by fine or imprisonment, or both. [Emphasis added.]

It is clear from the foregoing that the few statements by way of dictum in the decisions of this Cou- to the effect that the Thirteenth Amendment's abolition of slavery and involuntary servitude is limited to a ban on enforced compulsory service of one to another and does not include a ban on public or private conduct which would preserve or continue any of the incidents of human slavery, are wholly without foundation either in the intent of Congress as expressed in the debates or in the understanding of the courts or the people at the time of its adoption.

D. The Congressional Debate on the Civil Rights Act of 1866

Soon after the Thirty-Ninth Congress convened in December, 1865, its members introduced a variety of bills to give explicit statutory support for the guarantees regarded as necessary if freedmen were to be given something more than parchment rights and freedom from only the forms of bondage. Representative Benjamin F. Loan of Missouri sponsored a resolution directing the Select Committee on Freedom to consider "legislation securing to the freedmen and the colored citizens of the States recently in rebellion the political and civil rights of other citizens of the United States."[15] Senator Henry Wilson of Massachusetts sponsored a bill declaring void all "laws, statutes, acts, ordinances, rules and regulations" establishing or maintaining "any inequality of civil rights and immunities" based on color or previous slavery in the rebel states.[16] Senator Charles Sumner of Massachusetts introduced bills against "all laws and customs * * * establishing any oligarchical privileges and any distinction of rights on account of color or race" in those states. They declared all persons in such states are recognized as equal before the law and gave the federal courts exclusive jurisdiction of all suits, criminal or civil to which a person of African descent was a party.[17]

Although these proposals died they are significant as showing a uniformity of approach by the draftsmen and

15. CONG. GLOBE, 39th Cong., 1st Sess. 69 (1865).

16. *Ibid.*, at 39.

17. *Ibid.*, at 91-95.

supporters of the Civil Rights Act of 1866 to the protection of the rights as humans and the essential needs of the freed men. These were in terms of the "full protection in the enjoyment of their inalienable rights," "equality of civil rights and privileges," equal rights before the law, the same civil rights as other citizens—in a word, equal protection of law for men's civil, that is, natural rights.[18]

Even before the 1866 Bill as such was introduced, Senator Lyman Trumbull of Illinois, Chairman of the Judiciary Committee, announced an December 19, 1865, the day after the Thirteenth Amendment was ratified, that he would introduce a bill modifying the Freedmen's Bureau in order to make personal rights more secure. This he later divided into two measures, one of which became the Civil Rights Act. Since it has been commonly thought that this measure was influential in determining the character of the first section of the Fourteenth Amendment, Trumbull's purposes stated in December are worth noting.[19] He outlined his objectives of:

> [(1)] quieting apprehensions in the minds of many friends of freedom lest by local legislation or *a prevailing public sentiment* in some of the states, persons of the African race should continue to be oppressed and in fact deprived of their freedom, and of (2) showing to those among whom slavery has heretofore existed that unless by local legislation they provide for the real freedom of their former slaves the Federal Government will, by virtue of its own authority, see that they are fully protected.[20] [Emphasis added.]

18. tenBroek. *supra*, fn. 2, at 176.

19. James, *The Framing of the Fourteenth Amendment* (1956, University of Illinois Press). at 50.

20. *Ibid.*

The bill that became the 1866 Act, S. 61, was introduced in the Senate by Senator Trumbull, on January 5, 1866.[21] From the first, it contained in its first section[22] the language here involved.

Senator Trumbull first expressed his view of Congressional power under the Thirteenth Amendment in the debate on the Freedmen's Bureau Bill, which was considered by the Senate just before it debated the Civil Rights Act of 1866. Making it clear that he was talking of both bills, he said

> If the construction put by the Senator from Indiana upon the amendment be the true one, and we have merely taken from the master the power to control the slave and left him at the mercy of the State to be deprived of his civil rights, the trumpet of freedom that we have been blowing throughout the land has given an "uncertain sound", and the promised freedom is a delusion.
>
> * * *
>
> I have no doubt that under this provision of the Constitution we may destroy all these discriminations in civil rights against the black man; and if we cannot, our constitutional amendment amounts to nothing. It was for that purpose that the second clause of that amendment was adopted, which says that Congress shall have authority, by appropriate legislation, to carry into effect the article prohibiting slavery. Who is to decide what that appropriate legislation is to be? The Congress of the United States; and it is for Congress to adopt such appropriate legislation it may think proper, so that it be a means to accomplish the end.[23]

21. CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866).

22. *Ibid.*, at 211, 474.

23. *Ibid.*, at 322.

In opening debate on the Civil Rights Bill, Senator Trumbull said of the first section:

> This section is the basis of the whole bill. * * * Has Congress authority to give practical effect to the great declaration that slavery shall not exist in the United States? If it has not, then nothing has been accomplished by the adoption of the constitutional amendment. In my judgment, Congress has this authority.[24]

He went on:

> * * * I hold that we have a right [under the Thirteenth Amendment] to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. * * *[25]

Specifically referring to Section 2 of the Amendment, Senator Trumbull said (*ibid.*):

> * * * the clause of the Constitution under which we are called to act in my judgment vests Congress with the discretion of selecting that "appropriate legislation" which it is believed will best accomplish the end and prevent slavery.

The same view was expressed by Senator Jacob M. Howard of Michigan, a Radical Republican like Senator Trumbull, and a member of the Joint Committee of Fifteen established by the House and Senate in December 1865 under a resolution directing them to "inquire into the condition of the states which formed the so-called Confederate States of America and report whether they or any of them are entitled to be represented in either House of

24. *Ibid.*, at 474.

25. *Ibid.*, at 475.

Congress."[26] Senator Howard specifically rejected the narrow view of the Thirteenth Amendment, saying:[27]

> * * * I take this occasion to say that it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and the freedmen which is proposed to be exercised by the bill now under our consideration.

It was "easy to foresee," he argued, that the slave states would attempt to nullify mere emancipation and that hence more would be needed. Opponents of the bill, he said, argue that the Amendment does no more than cut the slave's "legal ligament" to his master

> * * * and there leaves him, totally, irretrievably, and without any power on the part of Congress to look after his well-being from the moment of this mockery of emancipation. Sir, such was not the intention of the friends of this amendment at the time of its initiation here and at the time of its adoption; * * * (*ibid*).

During the debate on overriding President Johnson's veto, Senator William M. Stewart of Nevada said:

> Although I am a strong advocate for local government, and extremely anxious that these matters should be attended to by the States as early as practicable, still I believe that it was the intention of those who amended the Constitution, as plainly indicated by that amendment, *to give the power to the General Government to pass any necessary law to secure to the freedmen personal liberty.* I believe that was the intention. I believe that is within the legitimate scope of legis-

26. CONG. GLOBE, 39th Cong., 1st Sess. 7 (1865).

27. CONG. GLOBE, 39th Cong., 1st Sess. 503 (1866).

> lation. I believe that power is in the General Government. I do not believe there is any constitutional argument against it that is worthy of serious consideration.[28] (Emphasis supplied.)

The debate in the House was opened by Rep. James F. Wilson of Iowa. On the matter of power under the Thirteenth Amendment, Rep. Wilson referred to Justice Marshall's well-known dictum in *McCulloch* v. *Maryland*, 17 U. S. (4 Wheat.) 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

He went on to say of the bill:

> The end is legitimate, because it is defined by the Constitution itself. The end is the maintenance of freedom to the citizen * * *. A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery. Anything which protects him in the possession of these rights insures him against reduction to slavery. This settles the appropriateness of this measure, and that settles its constitutionality.[29]

Rep. M. Russell Thayer of Pennsylvania said:

> For one, sir, I thought when I voted for the amendment to abolish slavery that I was aiding to give real freedom to the men who had so long been groaning in bondage. I did not suppose that I was offering

28. *Ibid.*, at 1785.

29. *Ibid.*, at 1118.

> them a mere paper guarantee. And when I voted for the second section of the amendment, I felt in my own mind certain that I had placed in the Constitution and given to Congress ability to protect and guaranty the rights which the first section gave them.[30]

The debates on the 1866 Act reveal that the supporters of the bill not only believed that they had the power to give broad protection to the rights of the newly freed slaves and to secure for them and all the people of the United States, the essential rights of free men but also that they were doing just that in the legislation before them. The concept that the amendment and congressional action thereunder must be limited to the elimination of the forced service of one to another, the surface aspect of slavery, was held only by the minority which opposed both the amendment and the bill. The purpose of the majority was to give reality to the verdict of freedom flowing from the Civil War and the purpose of the minority was to nullify that verdict and to limit the goal to a reconstitution of the Union.

Thus, Senator Trumbull, in his opening speech on the bill, said that the bill would make Negroes citizens and thereby give them:

> The great fundamental rights set forth in this bill: the right to acquire property, the right to go and come at pleasure, the right to enforce rights in the courts, to make contracts, and to inherit and dispose of property. These are the very rights that are set forth in this bill as appertaining to every freeman.[31]

30. *Ibid.*, at 1151.

31. *Ibid.*, at 475.

Later, he said:

> Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; * * *
>
> * * * *the very object of the bill is to break down all discrimination between black men and white men.* (Emphasis supplied.)[32]

During the debate on passing the bill over President Johnson's veto, Senator Trumbull said that the civil rights protected by the bill were the "natural rights" belonging to all; he quoted Chancellor Kent as saying that "The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property."[33]

Senator Trumbull's view that the bill barred all discrimination between white and black was echoed by Senator Howard when he said that "in respect to all civil rights * * * there is to be hereafter no distinction between the white race and the black race".[34]

Senate opponents of the measure held the same view of its thrust. Arguing now for the first time that the Thirteenth Amendment, including Section 2, had a narrow effect, they insisted that the bill before them went far beyond the power Congress had been given. But even they conceded that the Amendment and the bill applied to private persons

32. *Ibid.*, at 599.

33. *Ibid.*, at 1757.

34. *Ibid.*, at 504.

as well as the state. This view was expressed, for example, by Senator Garrett Davis of Kentucky who said:

> * * * this measure proscribes all discriminations against negroes in favor of white persons that may be made anywhere in the United States by any "'ordinance, regulation or *custom,*" as well as by "law or statute." * * *
>
> But there are civil rights, immunities and privileges "which ordinances, regulations, and *customs*" confer upon white persons everywhere in the United States and withhold from negroes. On ships and steamboats the most comfortable and handsomely furnished cabins and state-rooms, the first tables, and other privileges; in public hotels the most luxuriously appointed parlors, chambers, and saloons, the most sumptuous tables, and baths; in churches not only the most softly cushioned pews, but the most eligible sections of the edifices; on railroads, national, local, and street, not only seats, but whole cars, are assigned to white persons to the exclusion of negroes and mulattoes. All these discriminations in the entire society of the United States are established by ordinances, regulations, and *customs.* This bill proposes to break down and sweep them all away, and to consummate their destruction, and bring the two races upon the same great plane of perfect equality. (Emphasis added.)[35]

Supporters of the bill made no effort to deny this sweeping characterization of what they intended.

In the House, Representative Wilson, in his opening speech on the bill, defined civil rights, saying:

> The definition given to the term "civil rights" in Bouvier's Law Dictionary is very concise, and is supported by the best authority. It is this:

35. *Ibid.*, App. 183.

> "Civil rights are those which have no relation to the establishment, support, or management of government."

From this it is easy to gather an understanding that civil rights are the natural rights of man; and these are the rights which this bill proposes to protect every citizen in the enjoyment of throughout the entire dominion of the Republic.[36]

Representative Thayer asked:

> What kind of freedom is that under which a man may be deprived of the right of going at his own volition from one place to another; may be deprived of the ability to make a contract; may be deprived of the ability to sell or convey real or personal estate; may be deprived of the liberty to engage in the ordinary pursuits of civilized life. * * *?[37]

Representative William Windom of Minnesota spoke to the same effect.[38]

Running through the debates is the determination of the leaders to embody in law the judgment against slavery spoken by the Civil War and to prevent its being reversed either immediately by the former rebel states or at any time in the foreseeable future by toleration of inequality. This view was well expressed by Rep. John M. Broomall of Pennsylvania:

> Mr. Speaker, it is alleged that this species of legislation will widen the breach existing between the two sections of the country, will offend our southern brethren. Do not gentlemen know that those who are most

36. CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866).

37. *Ibid.*, at 1152.

38. *Ibid.*, at 1159.

> earnestly asking this legislation are our southern brethren themselves? They are imploring us to protect them against the conquered enemies of the country, who, notwithstanding their surrender, have managed, through their skill or our weakness, to seize nearly all the conquered territory. This is not the first instance in the world's history in which all that had been gained by hard fighting was lost by bad diplomacy.[39]

The purpose of the bill, then, was "to break down all discrimination between black men and white men".[40] *The debates make it clear that this aim was limited to discrimination by state action.* The whole concept that Congressional power under the amendments was limited to state action did not enter into the debates in Congress until 1870.

Once it is recognized that the intent behind the Thirteenth Amendment was to empower Congress "to pass any necessary law to secure to the freedmen personal liberty" and that the intent behind the first Civil Rights Act was to "break down all discrimination," there is no basis for limiting the act to state action. The Congress that adopted this act and the one that approved the Thirteenth Amendment were concerned with "liberty" in its broadest sense and were certainly aware that "discrimination" could be and was being achieved by private action. If it had intended to limit the act to state action, it could readily have expressed that intent in the statute in simple terms.

Undoubtedly, discriminatory state action was also within the contemplation of the supporters of the bill. The

39. *Ibid.*, at 1264.

40. CONG. GLOBE, 40th Cong., 1st Sess. 3611, 3671 (1867).

Black Codes enacted by the southern states after the end of the War had been recognized as an attempt to keep the freedmen in effective bondage[41] and the 1866 Act was aimed at nullifying them. But it cannot be concluded from this that state action was the sole target of the act. *This distinction does not appear in the debates or in the statute itself.*

The men who wrote and made into law the Thirteenth Amendment and the Civil Rights Act of 1866 were well aware of the role played in protection of private property by state power as well as by private force. They were, of course, familiar with the legal machinery set up by the state to protect private property in human beings. And they knew the interrelationship between private action to protect property and state action for that purpose. They were well aware of the effort being made to use state power to buttress private action individually and by conspiracies, to salvage as much as possible of the institution of slavery. In their discussion of the Civil Rights Act of 1866 they made it clear that the Act was aimed at both prongs of the effort of the slave holders to preserve their power over the freed slaves, to use them for servile labor and to deny them the rights essential for the maintenance of their freedom. They sought by the act to bar forever any possible recrudescence of the evil of human slavery. The supporters of the bill denounced the Black Codes. But far from confining themselves to the elimination of these efforts to reinstitute aspects of slavery through the use of state power, they spoke of the protection of broad rights such as the right of personal security, the right of personal liberty

41. tenBroek, *supra*, fn. 2, at 180-81.

and the right to acquire and enjoy property, against any invasion. They spoke not just of law, statute, ordinance and regulation, but also of custom and usage. The right of personal security is one that requires protection primarily against individual conduct. So, too, our country has learned that the right to acquire and enjoy real property is one which requires protection primarily against individual conduct. The inclusion of both rights, to personal security and to acquire and enjoy real property, in the rights declared to be under the protection of the act and the Thirteenth Amendment is a clear demonstration of the intent of the authors of the Act and those who approved it over the presidential veto, to extend the federal power to the protection of those rights, as a necessary aspect of the end of all the incidents and vestiges of slavery.[42]

In the Civil Rights Cases, *supra,* Mr. Justice Bradley speaking for the Court acknowledged the need for interplay and cooperation between state and private power in the maintenance of slavery and conceded that the Thirteenth Amendment empowered Congress to deal with both aspects of the problem. He said at 20:

> It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes

42. McPherson, *The Struggle for Equality* (1964, Princeton University Press) at 341.

> Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. * * *

While the Court then rejected the argument that discrimination in places of public accommodation is such a badge of slavery (erroneously, we believe) it went on to say at 22:

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restrained of his movements except by his master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution * * * Congress, as we have seen. by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities; the necessary incidents of slavery, constituting its substance and visible form and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.

Thus this Court, even while limiting the impact of the Fourteenth Amendment, conceded that the Thirteenth Amendment extended federal protection to the right of all persons to purchase and hold property free from discrimination based on race and that this right was federally protected from invasion by private persons as well as the State under the Thirteenth Amendment and the 1866 Act adopted under its authority.

E. The Meaning and Effect of the Act

Section 1 of the Civil Rights Act of 1866 opens with a declaration that all persons born in the United States except subjects of a foreign power and Indians not taxed are citizens of the United States. Thus all the former slaves were made citizens as were those who had been freed before the Civil War or were descendants of such free Negroes born in the United States. And the grant of citizenship was of federal citizenship, not citizenship of the state in which each freed Negro resided. This grant applied everywhere in the United States, not just in the rebel states. That this declaration was of utmost importance is demonstrated by the fact that at the time of the adoption of the act the State of Indiana had a constitutional provision barring any Negro or mulatto from coming into or settling in the State[43] and voiding all contracts made with any Negro or mulatto coming into the state.[44] And the Indiana legislature had passed an act to enforce this article of the state constitution on June 18, 1852. 1 G. & H. 443. See *Smith* v. *Moody*, 26 Ind. 299-300 (1866).

The fact that the act speaks in terms of "citizenship of the United States" is also significant. Here is a declaration by Congress, under the authority of the Thirteenth Amendment that there can be a federal citizenship, not merely a state citizenship, and that this federal citizenship carried with it rights which were not dependent on the attributes of each citizen's home state but survived independently of such state citizenship attributes and limitations. Here was a rejection of the supposition that the destiny of slavery within and between the states was to be

43. Indiana State Commission, Article XIII, Sec. 1 (1851).

44. *Ibid.*, Sec. 2.

determined by their law and not by the laws of the United States.[45] Implicit in this declaration is the giving of statutory force to what the sponsors of the Thirteenth Amendment and the 1866 Act had spoken of, a federal citizenship which embodied the natural rights seen in Anglo-Saxon law and tradition as the minimum essential rights one must have to be free.[46]

Section 1 of the 1866 Act goes on to declare that "such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude * * * shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens." Finally, the section guaranteed to such citizens that they would be "subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." This enumeration of rights calls to mind the summary of the fundamental rights of citizenship of Mr. Justice Washington in *Corfield* v. *Coryell,* 4 Wash. C.C. 371, 6 Fed. Cas. 546 (E.D. Pa. 1823) as including:

> the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pur-

45. Howe, *supra,* fn. 14, at 41. Professor Howe's analysis is most enlightening on this question of the relation between federal citizenship and the state power over slavery.

46. tenBroek, *supra,* fn. 2, at 178, 185 and fn. 14 herein. See also, Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four,* 9 William and Mary Law Rev. (1967) 1 at 4.

> sue and obtain happiness and safety; * * * The right of a citizen of one state to pass through, or reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; * * * to take, hold and dispose of property either real or personal; * * * (at 551-2).

Certainly this charter, spelling out in detail the rights implicit in and necessary to the implementation of the abolition of slavery and involuntary servitude, destroyed forever the iniquitous and racist strictures of *Scott* v. *Sanford*, 19 Howard. 393 (1857), which sought to place the dark skinned human being in a category somewhere between humankind and its animal beasts of burden and supply. The denial of these basic rights in the slave states was by no means the sole source of the specific rights enumerated as now guaranteed by the act. That a chattel could not hold property, levy action in court, make and enforce contracts, be educated, testify as witness and receive the protection of the law for an offense against his person was obvious. And that permitting freed slaves to walk and live free and assert any of these rights endangered the security of the slaveholder's in their chattel was equally obvious. So laws and customs barring these rights to Negroes were to be expected to exist in the South.

But prior to the Civil War the status of free Negroes in the North was little better than that of their slave brethren in the South. They were shut out from white schools and churches, forced to live in city slums and ghettos, denied equal civil and political rights, subject to Jim Crow legislation and degrading "black laws" in many states, confined to menial occupations and almost univer-

sally despised as members of an "inferior" race.[47] And whether these dire results were due to law or custom was not relevant when legislation was being adopted to do away with these disabilities. The existence of laws requiring their imposition made it impossible for even the dissenter, the abolitionist, the good Christian, to act in accordance with his beliefs, and they transferred to the entire community the stain of slavery. But it was the institution, not its source in law or action of private individuals, which contradicted the fundamental concepts of Anglo-Saxon freedom on which our system was based and made slavery "odious."[48]

The language of the Act makes it clear that it is aimed not just at "Black Codes" and other state laws imposing discrimination on the basis of race or previous condition of servitude but rather at any and every effort or development, whether by use of state power or by private power, to re-establish and re-impose on any group the incidents or practices of slavery.[49] The use in the statute of the term "custom" makes it clear that its thrust is by no means limited to the exercise of state power. And the discriminations it bars deal with far more than the right of access to state facilities. Clearly the guarantee against racial discrimination in the right to make contracts can have meaning only in terms of a limitation on the right of private individuals, the other parties to such contracts. And the civil right here in issue, to purchase and hold real

47. McPherson, *supra*, fn. 40 at 223.

48. The Case of James Sommersett, 20 How State Trials 2, 82 (1772).

49. See, Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 Columbia Law Rev. 131, at 138-40 (1950).

property, is equally a right which can have no meaning if private individuals, who are the sellers of most real property, are free, either through conspiracies or individually, to nullify the right by refusing, on the basis of racial bigotry or discrimination, to sell property they have put on the market.

The evil effect of such discrimination, in terms of reinstituting an incident of slavery, or excluding members of the racial group descended from slaves from full participation in the life of the community, of rendering them more subject to economic exploitation and less able to develop their capabilities on a basis equal with members of other racial groups, has been recognized by many states and local communities, which have taken action by law to bar such discrimination.[50]

F. Psychological and Sociological Aspects of Housing Segregation

The conclusion reached by the lawmakers of these states is not without basis in fact. This is evident from the following analysis made by Professors Kenneth B. Clark,

50. See *e.g.*, Alaska Sess. Laws ch. 49, §20-1-3 (1962); Calif. Health & Saf. Code §35700 (Supp. 1965); Colo. Rev. Stat. Ann. §§69-7-1-5 (1963); amended: Colo. Sess. Laws ch. 185 (1965); Conn. Gen. Stat. Rev. §53-35 (Supp. 1963); Ind. Stat. Ann. §40-2308 (1965); Me. Rev. Stat. Ann. ch. 17, §1301 (Supp. 1965); Mass. Laws Ann. ch. 151B, §4 (6, 7) (1965); Mich. Comp. Laws §750.146 (Supp. 1961); Minn. Stat. Ann. §363.03(2) (Supp. 1965); N.H. Rev. Stat. Ann. §354-A:8(IV) (Supp. 1965); N.J. Stat. Ann. §55:14A-39.1 (1964); N.Y. Executive Law §296(5) (Supp. 1965); Ohio Rev. Code Ann. §4112.02(H) (Baldwin, Supp. 1965); Ore. Rev. Stat. §659.033 (Supp. 1965); Pa. Stat. Ann. Tit. 35, §1664 (1964); R.I. Gen. Laws Ann. §§34-17-1 11 (Supp. 1965); Wisc. Stat. Ann. §101.60(2) (Supp. 1966).

In 1967, Hawaii, Iowa, Maryland, Vermont and Washington enacted fair housing statutes.

Isidore Chein and Stephen D. Berger, all outstanding scholars with special expertise in the field of housing discrimination, of the effects of racial segregation in housing which flow from the existing pattern of racial discrimination in the sale or lease of real property by private individuals acting either jointly on the basis of conspiracy or separately on the basis of parallel compliance with existing customs.

"Negroes are by far the most residentially segregated large minority group in recent American history."[51]

The urban Negro and the urban white live in different parts of the city.

Nor have the trends over time been encouraging. Generally speaking, residential segregation increased slightly between 1940 and 1950 and decreased slightly in the following decade. Between 1950 and 1960 residential segregation increased in most southern cities so that most are at least as segregated as northern cities.[52]

"The objective dimensions of the American urban ghettos are overcrowded and deteriorated housing, high infant mortality, crime, and disease. The subjective dimensions are resentment, hostility, despair, apathy, self-depreciation, and its ironic companion, compensatory grandiose behavior."[53]

Further, the poor housing situation of the Negro cannot be explained by his poverty. For this to be the case,

51. Tauber, *Negroes in Cities* (1965. Aldine Press), at 68.

52. *Ibid.*, at 44-5.

53. Clark, *Dark Ghetto* (1965, Harper and Row), at 11.

the quality of housing available at a given price should be the same for Negroes as it is for whites. The only possible conclusion is that "white and nonwhite households are not competing in the same housing market. Instead, white households are competing in a white housing market and nonwhite households are competing in a nonwhite housing market."[54]

The psychological effects of poor housing, *per se* are difficult to separate from the social meaning of housing as an indicator of social status. The most thorough study of the effects of housing, which compared a group of Negroes who moved into a public housing project with a group who remained in the slums found those in the housing project were more likely to feel they were getting their money's worth for the amount of rent, had closer relations to their neighbors, and more pride in their neighborhood. They felt they had improved their position in life and that they were rising in the world.[55]

"Housing is no abstract social and political problem, but an extension of a man's personality. If the Negro has to identify with a rat-infested tenement, his sense of personal inadequacy and inferiority, already aggravated by job discrimination and other forms of humiliation, is reinforced by the physical reality around him. If his home is clean and decent and even in some way beautiful, his sense of self is stronger. A house is a concrete symbol of what the person is worth."[56]

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54. Duncan and Hauser, *Housing a Metropolis—Chicago* (1960, The Free Press), at 204.

55. Wilson, Walkley, Pinkerton and Tayback, *The Housing Environment and Family Life* (1962, Johns Hopkins Press).

56. Clark, *supra*, fn. 53, at 32-33.

Residential segregation of the Negro creates segregated schools. The United States Civil Rights Commission has documented that the growth of urban ghettos and the movement of whites to the suburbs has dramatically increased the number of children attending segregated schools.[57] Studies done for the Commission show that segregated schooling *per se* has a harmful effect on students. Students in segregated schools perform more poorly than students in integrated schools even when the effects of students' backgrounds and of the class composition of the schools are controlled.[58] In addition, communities stigmatize segregated schools as Negro and therefore inferior. This constitutes one more factor in the life of the Negro which reinforces his membership in a lower caste and his feelings of low self-esteem.[59]

Interracial contact is extremely important in bringing about differentiated perceptions of the other race. This is particularly true for the school. As the Commission emphasized:

> Racial isolation in the schools also fosters attitudes and behavior that perpetuate isolation in other important areas of American life. Negro adults who attended racially isolated schools are more likely to have developed attitudes that alienate them from whites. White adults with similarly isolated backgrounds tend to resist desegregation in many areas —housing, jobs, and schools.
>
> At the same time, attendance at racially isolated schools tends to reinforce the very attitudes that as-

57. Report of the United States Commission on Civil Rights, *Racial Isolation in the Public Schools* (1967), 2 vol.

58. *Ibid.*, vol. 1, ch. 3.

59. *Ibid.*, vol. 1, p. 104.

sign inferior status to Negroes. White adults who attended schools in racial isolation are more apt than other whites to regard Negro institutions as inferior and to resist measures designed to overcome discrimination against Negroes. Negro adults who attended such schools are likely to have lower self-esteem and to accept the assignment of inferior status.

Conversely, Negroes who have attended desegregated schools tend to have a higher self-esteem, higher aspirations and are more likely to seek desegregated situations. Whites who have had desegregated education are more likely to report a willingness to accept Negroes in desegregated situations and to support measures that will afford equal opportunity.[60]

The residential segregation of the urban Negro also affects job opportunities for Negroes. Negroes are disproportionately employed near where they live. They are restricted from holding jobs in white neighborhoods, particularly from jobs where they would be seen by clients.[61] Second, since knowledge of available jobs is often obtained only through informal contacts, Negroes are restricted in this way as well from obtaining jobs elsewhere. Third, the time and cost of journeying to jobs outside of the central city are prohibitive for Negroes. Public transportation systems were developed to carry commuters *into* the central business and not *out* from the central city. And most Negroes are too poor to own an automobile. The McCone Commission emphasized the importance of inade-

60. *Ibid.*, vol. 1, p. 110.

61. Kaine, *Housing Segregation, Negro Employment and Metropolitan Decentralization* (to be published in Quarterly Journal of Economics, Feb. 1968). Available, Harvard University Program on Regional and Urban Economics, Discussion Paper No. 14, July, 1967.

quate public transportation for Negro unemployment in Watts.[62]

These three factors become tremendously important when it is realized that since the second world war new jobs have been created largely in the suburbs, far away from the ghettos.[63]

Ghetto residents tend to be shortchanged with regard to such services as schools, garbage removal and police protection.[64] They are also shortchanged by business in the ghetto—"the poor pay more" and all who live in the ghetto, poor or not, tend to buy at the same, largely white-owned stores.[65] Ghetto residents become embittered over such grievances and their occurrence is related to support for violent outbursts.[66]

Thus residential segregation into urban ghettos implies not only residential isolation. On the base of residential segregation is built poor, overcrowded and expensive housing, segregated and inferior schools, unemployment, economic exploitation and inferior services. All of these, harmful as they are in themselves, are much more destruc-

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62. *Ibid.*; also Kaine, *The Big Cities' Big Problem*, Challenge, Sept./Oct. 1966 (reprinted in the reprint series of the Joint Center for Urban Studies, Cambridge, Mass.).

63. Kaine, *The Distribution and Movement of Jobs and Industry*, Harvard University Program on Regional and Urban Economics, Discussion Paper No. 8, Nov. 1966.

64. Clark, *Dark Ghetto* (1965, Harper and Row); Coleman, et al., *Equality of Educational Opportunity* (1966, U. S. Government Printing Office) 2 vol.; Drake, *The Social and Economic Status of the Negro in the United States*, Daedalus, Winter 1965, at 771-814.

65. Caplowitz, *The Poor Pay More* (1963, The Free Press).

66. Murphy and Watson, *The Structure of Discontent*, Institute of Government and Public Affairs, University of California at Los Angeles (1967).

tive because they also reinforce the ghetto resident's realization that this is his lot because he is a Negro.

> Human beings who are forced to live under ghetto conditions and whose daily experience tells them that almost nowhere in society are they respected and granted the ordinary dignity and courtesy accorded to others will, as a matter of course, begin to doubt their own worth. Since every human being depends upon his cumulative experience with others for clues as to how he should view and value himself, children who are consistently rejected understandably begin to question and doubt whether they, their family, and their group really deserve no more respect from the larger society than they receive. These doubts become the seeds of a pernicious self- and group-hatred, the Negro's complex and debilitating prejudice against himself.[67]

From the perspective of the larger community, the metropolis, it can be argued that "Negro residential segregation is the most important of the fundamental causes of metropolitan disorders."[68]

> The central Negro ghetto has produced a distortion of metropolitan development that has added substantially to problems in central city finance, metropolitan transportation, housing, and urban renewal. The decline of central cities has been hastened by a conviction in the white community, both individual and corporate, that the ghetto would continue its rapid expansion with the associated problems of concentrated poverty and social disorganization.[69]

67. Clark, *supra*, fn. 53, at 63-64.

68. Kaine, *supra*, fn. 62.

69. Kaine and Persky, *Alternatives to the Gilded Ghetto*, Harvard University Program on Regional and Urban Economics. Discussion Paper No. 21, Sept. 1967, at 3.

One reason for the movement of whites to the suburbs, which causes the present transportation crisis, is the presence and expansion of central city ghettos which push "white residential areas farther and farther from central workplaces." "In the absence of encroaching racial ghettos, many central city homeowners might have been encouraged to renovate their existing properties rather than buy new houses in outlying areas." Without central city ghettos there would be more middle- and high-income residential demand in central cities, which would facilitate attempts at center city renewal. Also, suburban firms have been reluctant to move back into the city when faced with the prospect of the ghetto and the "long, hot summer." The flight of upper income whites and of firms to the suburbs, although not due only to expanding central city ghettos, has reduced the financial base for public services while the need for them has risen.[70]

Thus much of the urban crisis today is a product of Negro segregation into central city ghettos and the flight of whites from the Negro and from these ghettos.

The status component in residential segregation has already been discussed above. The corresponding status component in white reactions is also important. Race relations in America are always also status relations. Because residence is one of the most important manifestations of status, the connection between residential segregation and the low status of Negroes (and the corresponding high status of whites) is particularly close.

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70. Kaine, *supra*, fn. 62.

The quality and nature of housing and its neighborhood surroundings, its "address," are important symbols of status in American society. Neighborhoods are evaluated as higher or lower in status.[71] This means that neighborhoods tend to be composed of people approximately equal in status. Thus people in different occupations tend to be residentially segregated from each other according to the status of their occupations.[72] Housing and neighborhood cannot be discussed merely on the basis of their physical characteristics. The social element of status is always intimately involved.

In the competition to achieve high status, belonging to a lower caste is a tremendous constraint, belonging to a higher caste an advantage. As Myrdal had put it:

> When we say that Negroes form a lower caste in America, we mean that they are subject to certain disabilities solely because they are "Negroes" in the rigid American definition and not because they are poor and ill-educated.[73]
>
> The caste principle, as insisted upon and enforced by white society, would undoubtedly be best satisfied by a classless Negro community wherein all Negroes in all respects—educationally, occupationally, and economically—were in the lowest bracket and placed under the lowest class of whites.[74]

71. Warner and Hunt, *The Social Life of a Modern Community* (1944, Yale University Press); Warner, Meeker and Eells, *Social Class in America,* Science Research Associates (1949).

72. Duncan, *Residential Distribution and Occupational Stratification,* 60 American Journal of Sociology (1955), at 493-503.

73. Myrdal, *An American Dilemma* (1944, Harper and Row), at 669.

74. *Ibid.,* at 689.

This is not, and has never been, the case. Negroes are differentiated into classes in somewhat the same way as whites are. In this situation, caste has a slightly different meaning:

> On the same class level—that is, assuming white and Negro individuals with the same education, occupation, income, and so on—the white does *not* "look across" the caste line upon the Negro, but he definitely *looks down* upon him. And this fundamental fact of caste is materialized in a great number of political, judicial, and social disabilities imposed upon Negroes somewhat independent of their class * * *[75]

An important attribute of the American caste system is that equal-status contact with a member of the lower caste tends to be seen as lowering one's own status. It is this fact that makes the American race problem more than a problem of individual prejudice. Caste has its effects regardless of whether a given white is prejudiced or not.

Because housing is intimately connected with status, it is closely related to caste. Residential segregation occurs in part because whites do not wish to live near Negroes for fear of losing status. And residential segregation, which defines a Negro neighborhood as one of low status, helps to reinforce the lower caste status of the Negro.

Residential segregation cannot be explained by the lower economic position of the Negro.[76] Is is not only middle-class whites who fear and flee or fight when Negroes try to move into their neighborhood, nor is it that middle-class

75. *Ibid.*, at 692-693.

76. Tauber, *Negroes in Cities* (1965, Aldine Press), Pascal *The Economics of Housing Segregation,* Rand Corporation (March, 1965).

whites will not oppose the entry of middle-class Negroes into their neighborhood. The most typical situation today is not that of lower class Negroes trying to enter a white neighborhood, but rather: "Expansion of Negro residential areas in recent years has been led by Negroes of high socio-economic status—not only higher than the rest of the Negro population, but often higher than the white residents of the 'invaded' neighborhood."[77]

Residential segregation cannot be explained either by the prejudice of whites. When a neighborhood is "invaded" by Negroes, it is not the case that the racially prejudiced whites lead in leaving the neighborhood. The order of leaving is much more determined by the *status* of the whites, and their possibility of obtaining homes elsewhere.[78]

> Where one lives, both home and neighborhood, is closely linked to social status. When that status is threatened, the individual and the neighborhood take measures to combat this threat, usually by fleeing, but sometimes by violence. The fact that the threat may only be fancied is irrelevant. As long as people believe it to be true, it becomes the truth. In the case of Negroes, the high visibility factor, combined with the

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77. *Ibid.*, at 7.

78. Wolf, *The Invasion-Succession Sequence as a Self-Fulfilling Prophesy*, 13 Journal of Social Issues, No. 4 (1957), at 7-20; Fishman, *Some Social and Psychological Detriments of Intergroup Relations in Changing Neighborhoods: An Introduction to the Bridgeview Study*, 40 Social Forces (October 1961), at 42-51; Leacock, Deutsch and Fishman, *Toward Integration in Suburban Housing*, Anti-Defamation League of B'nai B'rith, n.d.; Lang, Kurt and Lang, *Resistance to School Desegregation: A Case Study of Backlash Among Jews*, 35 Sociological Inquiry (Winter, 1965), at 94-106.

low status of Negroes as a group, has produced an invasion-succession cycle that is separating most large American cities into two ghettos, Negro at core, white on the periphery.[79]

The residential caste segregation of the Negro means that the *sources* of high status in America, education, occupation and income, cannot be transformed into the appropriate American *symbols* or manifestation of high status. It forces the Negro who has "made his way up in the world" to see that he is still defined by others and must still define himself not as a person with a certain achieved status but as a Negro. When the rewards of status are not granted, people are less likely to make the effort necessary to better themselves.

> The middle-class Negro is demanding the right to share in the status symbols of personal success—quality education for his children; white-collar, managerial, or executive jobs; a fine home in one of the better neighborhoods. Having accepted the same value system which the middle-class whites live by, middle-class Negroes are forced to compete with them even at the risk of conflict. The demand for nonsegregated public schools comes largely from upwardly mobile middle-class Negroes; the demands for better white-collar, managerial, and executive jobs and for better nonsegregated housing come from the more successful and stable middle-class Negroes. If whites respond without more grudging tokenism * * * the masses of working-class and lower middle-class Negroes will benefit. *Other Negroes, too, will come to believe that*

79. Mayer, *Race and Private Housing: A Social Problem and a Challenge to Understanding Human Behavior*; 13 Journal of Social Issues, No. 4 (1957), at 3-6.

> *the average Negro can win rewards through persistence, hard work, thrift, and character.*[80]

Indeed, there is some evidence that the successful middle-class Negro cannot even obtain the appropriate status rewards of success inside of the ghetto.[81]

Caste, as a ranking of people without regard to their individual characteristics, is closely related to stereotyping. Studies of interracial contact, especially of interracial housing, all show that such contact tends to reduce stereotypes each race holds of the other, and to increase differentiated evaluations of individuals.[82] Thus, anything which hinders interracial contact helps preserve racial stereotypes.

But it is not interracial contact in itself which reduces stereotyping. Studies show that what is necessary is *equal-status* interracial contact in a non-competitive situation.[83]

> "Racial problems have not been problems of racial contact * * * It is not the sitting next to a Negro at a table or washing at the next basin that is repulsive to a white, *but the fact that this implies equal status.* Historically, the most intimate relationships have been

80. Clark, *supra*, fn. 53, at 60.

81. Tilly, Jackson and Kay, *Race and Residence in Wilmington, Delaware*, Teachers College Bureau of Publications (1965), at 84; Duncan, *Factors in Work-Residence Separation: Wage and Salary Workers, Chicago, 1951*; 21 American Sociological Review (February 1956), at 48-56.

82. Deutsch and Collins, *Interracial Housing* (1951, University of Minnesota Press); Wilner, Walkley and Cook, *Human Relations in Interracial Housing* (1965, University of Minnesota Press).

83. Harding, Kutner, Proshansky and Chein, *Prejudice and Ethnic Relations*, Lindrey, ed., Handbook of Social Psychology (1954, Addison-Wesley), vol. 2, at 1021-1061.

approved between Negro and white so long as status of white superiority versus Negro inferiority has been clear. Trouble comes only when Negroes decided not to be servants or mistresses and seek a status equal to that of whites. When Negroes start to assume symbols of upward mobility, then a pattern of residential segregation develops in the South, too.[84]

Since housing is linked to status, interracial residence is equal-status residence. Thus interracial housing and interracial neighborhoods would help to contradict and begin to destroy the stereotype and the lower caste position of the Negro. Conversely, residential segregation with Negroes restricted to low status areas helps to maintain stereotypes and to maintain the lower caste position of the Negro.

When forced residential segregation is such a powerful reinforcer of caste position it is not surprising that ghetto residents feel powerless, bitter, and alienated from the larger community. A Rochester study compared Negroes in similar economic circumstances in segregated and integrated neighborhoods:

> This single difference was associated with pronounced differences in how Negroes felt about life in Rochester. Those Negroes living on integrated streets were less likely to believe accusations of police brutality against Negroes, were less likely to be sympathetic with the 1964 Rochester riots, were less likely to be antagonistic towards whites, were less likely to feel whites were prejudiced, and were more likely to prefer living in Rochester. In my mind these differences arise because those Negroes who live on mixed streets feel more a part of the community; they feel more accepted by whites. Those who live in all-Negro neigh-

84. Clark, *supra*, fn. 53, at 60.

borhoods do not have the same feeling of belonging to the Rochester community.[85]

It is hardly surprising that collective violence becomes a live possibility for ghetto residents. Nor is it surprising that some have begun to try and make the best of the situation by redefining blackness as a positive virtue and separation from whites as a good thing.

The direct discriminatory effects of the ghetto and the meaning of these effects for relationships between the races and the reinforcement of caste are important. But the effect of the ghetto and its discriminations on the structure of the Negro community inside of the ghetto also is of concern. The Negro community is also a differentiated and stratified one, but the constraint of the ghetto does not provide enough space for the classes to be as spread out, as separated from each other, as in the white world.[86] Because of this, and because so many Negroes are still in poor economic circumstances, "many more Negroes than whites live in predominantly lower-class neighborhoods."[87] Thus most Negro children must go to segregated schools in which the predominant background of the other children is lower class. But the lower class composition of a school has a powerful depressing effect on educational performance.[88] The conclusion is that Negro ghetto children are doubly deprived by being forced

85. Harper, *Integration: Myth and Reality*, Address at the Fifth Regional Conference of the Attorney-General's Committee on Human Relations, Rochester, New York, December 15, 1965, at 6.

86. Tauber, *Negroes in Cities*, *supra*.

87. Report of the United States Commission on Civil Rights, *supra*, fn. 57, vol. 1, at 167.

88. Coleman, et al., *supra*, fn. 64, at vol. 1, ch. 3.

into segregated schools—by the class composition of the school as well as its racial segregation. Parents who try to instill a concern for achievement and for education in their children find their efforts negated by the class composition of the school.

It is well known that such manifestations of social disorganization as juvenile delinquency, drug addiction, crime and mental illness are found with high frequency in the ghetto. The closeness of the ghetto means that all of its residents will be exposed to these phenomena.

> The structure of the Negro neighborhood and the Negro community means that the Negro middle class * * * rarely escapes from the near presence of the Negro poor, as well as of the depraved and the criminal. The middle-class neighborhoods border on the lower-class neighborhoods, and suffer from robberies and attacks, and the psychic assaults of a hundred awful sights.[89]

An important theory of social disorganization argues that deviant behavior is a response to the lack of the means and the opportunity to achieve the means necessary to attain culturally valued goals.[90] Since Negroes are doubly deprived of means and opportunity—by their economic position and their caste—it is not surprising that such phenomena occur so frequently in ghettos.

An environment so full of crime, addiction and mental illness, as well as the discriminatory aspects characteristic

89. Glazer and Moynihan, *Beyond the Melting Pot* (1963, M.I.T. Press).

90. Morton, *Social Structure and Anomie,* Social Theory and Social Structure, Rev. Ed. (1957, The Free Press); Cloward and Ohlin, *Delinquency and Opportunity* (1960, The Free Press).

of the ghetto, works against the efforts of parents to instill appropriate aspirations and concerns in their children. The environment, instead of aiding parents' efforts—and the efforts of the children themselves—tends to thwart it. To escape its effects children have to dissociate themselves as much as possible from their immediate surroundings.

> My colleagues and I found that the most striking characteristic of the "squares"—that is, the non-delinquent, non-drug-using youth—in high delinquency, high drug-use areas of the city is the degree to which they actively dissociate themselves from their destructive environment and work toward leaving it entirely. They are not as yet free to change their place of residence, but they can try to spend as little time as possible on the streets, to select their companions carefully, to concentrate on their school work, to spend their free time in reading and activities of the community center, to seek out suitable adults to serve as models, confidants and advisors, and so on.[91]

There is little wonder then that people wish to escape from such an environment. Added pressure for escape comes from the higher status of white neighborhoods. Middle-class Negroes are especially eager to escape from the ghetto,[92] and become embittered once again when they find that the ghetto has caught up with them again. The result is that all those in the ghetto are dissatisfied with it, and not merely those economically at the bottom. A study of Watts concluded:

> It is important to note that a high level of discontent seems to pervade the entire curfew community.

91. Chein, *Environment and Personality in Behavior Deviation*, Address at the 19th Annual Meeting of the New York Society of Clinical Psychologists, New York, May 20, 1967, at 1-2.

92. Fishman, *supra*, fn. 78, 40 Social Forces at 42-51.

> This is particularly striking in the light of the often repeated refrain that problems of police brutality and exploitation by merchants are essentially confined to the poorer segments of the segregated community. Silberman, for example, argues that "squalid housing, a narrow range of job possibilities, frequent unemployment, low pay, exploitation (whether real or imagined) by landlords, shopkeepers and employers, police brutality—these are the grievances that animate the Negroes that live in the big city slums." We have found that these grievances are indeed salient for the Negroes in Los Angeles and are related to support for the riot and participation in it, but they are not limited to those who form the "underclass" of the Negro community.[93]

The ultimate and increasingly frequent response of ghetto residents to such a totally destructive environment is the riot. There is some reason to think that ghetto residents, feeling that no ordinary action will have any effect on the fact of the ghetto, are increasingly coming to see the riot as an acceptable form of political action.

> Rioting evolves as a form of collective pressure or protest where large numbers of people are crowded and alienated together, sharing a common fate that they no longer accept as necessary, though to them it may seem inevitable.[94]

Increasingly many Negroes are obtaining more education, better jobs, higher incomes, although it is not clear

93. Murphy and Watson, *The Structure of Discontent,* Institute of Government and Public Affairs, University of California at Los Angeles (1967), at 112-114.

94. Lang, *"Racial Disturbances as a Collective Project,"* paper presented at the meeting of the American Sociological Association, San Francisco, August 1967, p. 14.

that the position of Negroes as a group, as compared to whites, is improving.[95] At the same time residential segregation is not declining. and the ghettos are growing. One of the most important American manifestations of status, the home and the neighborhood, is being denied to increasingly many Negroes just as they achieve the characteristics that are supposed to bring high status. The pluralist position which argues that Negroes should be "assimilated" into the larger society while remaining physically separated (by their own choice) fails to see this contradiction. As long as high status is not given to the achievements which merit it in white society, this contradiction increases the destructive effects of the ghetto.

This contradiction between the material improvement of many and their continued status frustration is exceedingly dangerous. It is the classical cause of collective violence.

> It has often been noted by students of revolutionary movements that the period of greatest violence occurs not when people are most deprived and repressed, but rather when things seem to be improving. This has been explained as a consequence of frustrations experienced by persons whose expectations have been raised by material improvements in their life situations and who impatiently come to expect further gains which are not immediately obtainable. In a psychological sense, such persons compare themselves with those enjoying more of the rewards of society rather than with those less fortunate or with their own previous deprivations. Accordingly, modest gains exaggerate feelings of frustration and despair rather than

95. Fein, *An Economic and Social Profile of the Negro American*, Daedalus (Winter, 1965), at 815-846.

diminish them. In the present case, it has been remarked by many public officials that Los Angeles, with its palm-lined streets of single-family dwelling units, its absence of rat-infested alleys, and its relatively better labor market, should not be experiencing violent racial troubles. The above theory would suggest that such improvements in living conditions trigger higher expectations among the inhabitants and a heightened sense of "relative deprivation." * * * The Los Angeles riot * * * appears to have been a collective emotional explosion of persons responding not to ideological pronouncements but to an accumulation of irritation and despair and to the excitment of the moment.[96]

The harmful and destructive effects of forced ghettoization have been outlined above. The results of these effects in reinforcing caste have been shown to be at the base of the present metropolitan problem. The urban problem is a crisis, for discontent, frustration and bitterness are uniform throughout the ghetto. Middle-class ghetto Negroes, as well as lower-class ones, are increasingly willing to resort to violence.

> * * * the motivations of persons supporting that riot vary with their relative positions in the structure of the community. Those who are better off seem to evidence considerable anti-white sentiment which is significantly related to their participation in violence. Those less fortunate rebel against discrimination and appear to be motivated mainly by economic discontent. Mistreatment or exploitation by whites (merchants and police) seems to be a source of riot support for all levels in the ghetto. Such evidence of differential mo-

96. Murphy, *Postscript on the Los Angeles Riots,* Murphy and Elinson, eds., Problems and Prospects of the Negro Movement (1966, Wadsworth), at 231-234.

> tivation points to the hypothesis that the more fortunate members of the community compare themselves with the white majority *and feel frustrated at their inability to gain benefits in keeping with their status aspirations.* Such persons have made social and economic gains, but along with their mobility have gone rising levels of expectation. We have seen that the amount of social contact with whites increases with improvements in socioeconomic status. But we have also seen that discontent increases as social contact increases. We would expect that continued contact with white persons by those Negroes who have made economic gains would serve to increase their impatience and frustration at not being able to enjoy the same freedom of movement and opportunity taken for granted by white persons in their quest of "the American dream." We suspect that many white persons have viewed the middle-class Negro group as a moderating influence in the racial struggle. * * *
>
> We find little room for such an optimistic appraisal. If our analysis is correct, the problems of urban life for the Negro, even in the palm-lined spaciousness of Los Angeles, have grown acute and a significant number of Negroes, successful or unsuccessful, are emotionally prepared for violence as a strategy or solution to end the problems of segregation, exploitation, and subordination.[97] [Emphasis added.]

The foregoing discussion of the effect on the victims of racial segregation in housing, confined thereby to the racial ghetto, is primarily in terms of the effect of such segregation on the self-image of Negro Americans. It demonstrates that today, more than one hundred years after the Thirteenth Amendment and the adoption of the federal law guaranteeing the right of all citizens to purchase and hold

97. Murphy and Watson, *supra,* fn. 66, at 114-115.

real property without discrimination based on race, a pattern of denial to our Negro citizens of that right in our country still remains primarily through widespread racially discriminatory practices by private sellers. The denial of that right which the post-Civil War congresses and federal courts stated to be a badge of servitude, results in its continued existence even now. And such continuance is a violation of the rights protected by the 1866 Act and Section 1982.

Another aspect of the foregoing discussion which has relevance to the issue before this Court in this case is the description of the psychological impact of the segregated racial ghetto on its inhabitants. This Court in *Brown* v. *Board of Education*, 347 U. S. 483, 493-95 (1954) took cognizance of the fact that racial segregation of children in public schools generates in children so segregated "a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (at 494). Confinement to a racial ghetto causes not only children, but all those imprisoned in it because of their race to suffer from precisely the disabilities which the 1866 Act sought to end for all the victims of human slavery because its authors knew that without so doing they would fail in their goal of bestowing true freedom on them, of insuring that they could enter the free American society on a basis of equality.

Section 1 of the 1866 Act did, of course, bar many forms of discriminatory state action. Thus the rights to sue and be parties and give evidence can have effect both in instrumentalities of the state and in litigation between private parties. The right to inherit property also is dependent

on the operation of the state's machinery governing decedents' estates. And conveyance and holding of real property normally involves, in addition to private conduct, and the operation of some forms of state machinery such as recordation, the payment of certain taxes and compliance with laws governing the transfers of the kind of property involved. And obviously the guarantee of full and equal benefit of all laws and proceedings for the security of person and property operates primarily as a check on the exercise of state powers. Hence it is clear that Section 1 involves prohibitions on both state and private action in order to achieve its basic goal, elimination for as long as it is law, of all the incidents of slavery and a guarantee to all, free from discrimination based on race, of equality in the exercise of all those civil rights it specifies, because its authors and the Congress that adopted the law believed them fundamental to freedom and necessary to do away forever with the possible revival of human slavery by extirpating every one of its incidents.

Applying the foregoing to the instant case it becomes clear that the District Court is in error when it says, "The legal right to purchase property does not, however, carry with it a corresponding obligation on the part of the owner to enter into a contract of sale against his will." And the Court of Appeals introduces an element of confusion when it questions whether Congress intended to create a duty to sell without discrimination. If the guaranty of the right of the petitioners herein to the same right to purchase real property as white citizens is to have any meaning or impact, it must mean that a would-be seller of real property whose terms as to price and time have been met cannot refuse to sell to the

person who has met those terms solely because of the race of the purchaser. It was not a desire to protect the marketability of property which led Congress to enact the 1866 Act. It was a recognition of the need to end for the freed men all the incidents of slavery. And if this goal is ever to be achieved, the right of Negroes to purchase property, in this instance real property, without discrimination based on race must carry with it a corresponding duty on the part of the seller who has placed his property on the market to sell without discrimination based on race. A seller faced with a would-be buyer who, aside from race, meets all his demands, demonstrates ability and willingness to pay the price asked, and plans a type of occupancy consistent with the seller's wishes, must have an obligation to sell to such a purchaser, if the right of that purchaser to buy free from racial discrimination is to have any reality. Here failure to impose such an obligation on the respondents toward the petitioner, may well result in denial to the Negro petitioner of the right to live anywhere in St. Louis County, even though he can afford a home there and housing facilities are available for sale there. If respondents are not held to be so obligated, they and other sellers similarly allowed to refuse to sell to Negroes, whether by conspiracy, custom or parallel action arising out of fear of social or economic repercussions or bigotry, may exclude Negroes from the entire county, and even, if the practice spreads far enough, the entire area. This would certainly be a denial of the petitioners' right to live and work where they will.

It is not here contended that the Congress that enacted the 1866 Act was intending to adopt a fair housing law.

Rather it intended to insure the right of all to purchase or lease real property without racial discrimination because denial of that right is an incident of slavery. It could not have foreseen the vast development of racial discrimination that has created our racial ghettos and the white surburban nooses around our cities[98] with their concomitants of poverty, slums, economic exploitation of the enforced dweller in the racial ghetto and segregation in education and in employment. But it would have conceded that these results are incidents of slavery which deny the fundamental rights of free men and therefore fall under the ban of the Act. It would have rejected any effort to interpret the Act as not preventing such patterns of racial discrimination in housing when imposed by private persons. It would have insisted that thus leaving the right of the Negro descendants of freedmen to live and work where they wished, dependent on the tender mercy of individual or corporate owners of real property would be to open the way to the perpetuation of an aspect of slavery.

G. Constitutional Authority for the Civil Rights Act of 1866

It is submitted that there are three different grounds in both the Thirteenth and Fourteenth Amendments to support the constitutionality of the Civil Rights Act of 1866. These are Section 2 of the Thirteenth Amendment, the Thirteenth Amendment's first section, and Section 5 of the Fourteenth Amendment.

Section 2 of the Thirteenth Amendment which specifically authorizes Congress to enforce the Thirteenth

98. Report of the United States Commission on Civil Rights, Part 4, *Housing* (1961), at 366-377.

Amendment by appropriate legislation is clear on its face. And the section was relied on as a basis for holding the Civil Rights Act of 1866 constitutional in one of the first cases in which that question arose, *United States* v. *Rhodes, supra.* Circuit Justice Swayne said:

> The second section of the amendment was added out of abundant caution. It authorizes congress to select, from time to time, the means that might be deemed appropriate to the end. * * * (at 793)
>
> Slavery, in fact, still subsisted in thirteen states. Its simple abolition, leaving these laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form and the gift of freedom would have been a curse instead of a blessing to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of the forecast. * * * (at 794)

The Court concluded, at 794, "We entertain no doubt of the constitutionality of the act in all its provisions."

In 1867, U. S. Circuit Judge Chase, in *In re Turner,* 24 Fed. Cas. 337 (1867), granted a writ of habeas corpus to the petitioner, Elizabeth Turner, a young person of color who with her mother had been slaves owned by the

respondent prior to the adoption of the 1864 Maryland constitution which abolished slavery. Almost immediately after petitioner was freed under the state constitution she was bound as an apprentice to respondent and, unlike white apprentices, she was not entitled to be taught reading and writing and arithmetic. To obtain freedom from this indenture she brought her petition of habeas corpus. Circuit Justice Chase found the apprenticeship indenture complained of in violation of the first section of the Civil Rights Act of 1866. He also held the law constitutional saying:

> This law having been enacted under the second clause of the thirteenth amendment, in enforcement of the first clause of the same amendment, is constitutional, and applies to all conditions prohibited by it whether originating in transactions before or since its enactment. (at 339)

In *United States* v. *Morris*, 125 Fed. 322 (1903), defendants were indicted for conspiring to injure, oppress and intimidate certain citizens of African descent in order to prevent them from exercising, on account of their race or color, the right to lease and cultivate lands, a right guaranteed them by Section 1 of the Civil Rights Act of 1866. Defendants demurred to the indictment. The validity of the indictment turned on the constitutionality of Section 1 of the Act. Noting that the statute contemplated acts of individuals, the Court indicated that its validity would have to rest on the Thirteenth Amendment, which unlike the Fourteenth and Fifteenth Amendments, is not limited to state action (at 323-24). The Court ruled (at 330-31):

> In my opinion, Congress has the power, under the provisions of the thirteenth amendment, to protect

citizens of the United States in the enjoyment of those rights which are fundamental and belong to every citizen, if the deprivation of these privileges is solely on account of his race or color, as a denial of such privileges is an element of servitude within the meaning of that amendment.' In the language of Mr. Justice Field, in his dissenting opinion in the Slaughter House Cases:

"The abolition of slavery and involuntary servitude was intended to make everyone born in this country a free man, and as such to give him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings, open to others of the same age, condition, and sex, and to reside in places, where others are permitted to live, would so far deprive him of the rights of a free man, and would place him as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a free man. The compulsion which would force him to labor, even for his own benefit, only in one direction, or in one place, would be almost as oppressive, and nearly as great an invasion of his liberty, as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude." 83 U. S. 90, 21 L.Ed. 413.

District Judge Trieber therefore overruled the demurrer, saying:

> That the rights to lease lands and to accept employment as a laborer for hire are fundamental rights, inherent in every free citizen, is indisputable; and a conspiracy by two or more persons to prevent negro citizens from exercising these rights because they are negroes is a conspiracy to deprive them of a privilege secured to them by the constitution and laws of the United States, within the meaning of section 5508, Rev. St. U.S. [U.S. Comp. St. 1901, p. 3712].

In *Harris, supra,* this Court also acknowledged the constitutionality of the Civil Rights Act of 1866 under the Thirteenth Amendment saying (at 640):

> It is clear that this amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure. Mr. Justice Swayne, in U.S. v. Rhodes, 1 Abb. (U.S.) 28; Mr. Justice Bradley in U.S. v. Cruikshank, 1 Woods, 308.
>
> Congress has, by virtue of this amendment, declared, in Sect. 1 of the Act of April 9, 1866, c. 31, that all persons within the jurisdiction of the United States shall have the same right in every State and Territory, to make and enforce contracts, to sue and be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other.

But there is authority to support the view that even if the specific authority given to Congress to enact appro-

priate legislation to enforce the Thirteenth Amendment had been omitted, the amendment would have been sufficient to establish the constitutionality of the act here under consideration, Section 1982 of Title 42. Thus in *United States* v. *Rhodes, supra,* Mr. Justice Swayne commented about the Thirteenth Amendment:

> Without any other provision than the first section of the amendment, congress would have had authority to give full effect to the abolition of slavery thereby decreed. It would have been competent to put in requisition the executive and judicial, as well as the legislative power, with all the energy needed for that purpose. (at 793)

And in *United States* v. *Cruikshank,* 25 Fed. Cas. 707, 711 (1874), Mr. Justice Bradley took the same position, saying:

> So, undoubtedly, by the 13th amendment congress has power to legislate for the entire eradication of slavery in the United States. This amendment had an affirmative operation the moment it was adopted. It enfranchised four millions of slaves, if, indeed, they had not previously been enfranchised by the operation of the Civil War. Congress, therefore, acquired the power not only to legislate for the eradication of slavery, but the power to give full effect to this bestowment of liberty on these millions of people. All this it essayed to do by the civil rights bill, passed April 9, 1866 (14 Stat. 27), by which was declared that all persons born in the United States * * * should be citizens of the United States; and that such citizens, of every race and color, * * * should have the same right * * * to inherit, purchase, lease, sell, hold and convey real and personal property, * * * as is enjoyed by white citizens * * *
>
> It was supposed that the eradication of slavery and involuntary servitude of every form and description

> required that the slave should be made a citizen and placed on entire equality before the law with the white citizen, and, therefore, that congress had the power under the amendment, to declare and effectuate these objects.

Another entirely independent authority for the constitutionality of Section 1982 is Section 5 of the Fourteenth Amendment. That amendment was considered and approved at the same Congressional session that earlier enacted the 1866 Act. As approved and ratified it provided in part:

> 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> • • • •
>
> 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The debates on the proppsed amendment were almost entirely confined to the matter of including the guarantee of citizenship in Section 1 and to the questions of representation of the southern states in Congress and disqualification of secessionists from office which were dealt with in what became Sections 2 and 3. There was relatively little discussion of the balance of Section 1 and almost none of Section 5. Nevertheless, there can be little doubt that the principal supporters of the amendment gave it the same

broad interpretation that they were contemporaneously giving the Thirteenth Amendment in the debates on the 1866 Act.

Thus, Senator Howard, leading off the debate in the Senate, said with respect to Section 5:[99]

> Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

He made it clear that he regarded Section 5 as going beyond the operation of Section 1 by saying:

> As I have already remarked, section one is a restriction upon the States, and does not, of itself, confer any power upon Congress. The power which Congress has, under this amendment, is derived, not from that section, but from the fifth section, which gives it authority to pass laws which are appropriate to the attainment of the great object of the amendment.[100]

The fact that the discussion in Congress of the effect of Sections 1 and 5 is limited to brief statements that Congress was to have power to achieve its "great object" only underscores the fact that the section was not limited to legislating against state action.

One aspect of the debate throws further light on the Thirteenth Amendment. The opponents of the 1866 Act, who were also opponents of the proposed amendment, repeatedly pointed out that the amendment duplicated some of the Act's provisions, such as those on citizenship. They

99. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

100. *Ibid.*, at 2768.

suggested that the amendment was designed to shore up the doubtful constitutional basis for the statute. Thus, Rep. William E. Finck of Ohio said of Section 1 of the proposed amendment:[101]

> Well, all I have to say about this section is, that if it is necessary to adopt it, in order to confer upon Congress power over the matters contained in it, then the civil rights bill, which the President vetoed, was passed without authority, and is clearly unconstitutional.

The amendment's supporters replied that their purpose was quite different; they desired to entrench the statutory provisions in the Constitution where it would take more than a possible future Democratic Party majority to repeal it.[102] Rep. Stevens put it this way:

> Some answer, "Your civil rights bill secures the same things." That is partly true, but a law is repealable by a majority. And I need hardly say that the first time that the South with their copperhead allies obtain the command of Congress it will be repealed * * * This amendment once adopted cannot be annulled without two-thirds of Congress. That they will hardly get.[103]

The proponents thus made it clear that they had no doubt as to the power of Congress to take broad action under the Thirteenth Amendment. This view was expressed in detail by Senator John B. Henderson of Missouri, in a lengthy speech in which he reviewed the history

101. *Ibid.*, at 2461.

102. See, e.g. *Ibid.*, at 2462, 2465.

103. *Ibid.*, at 2459.

of slavery and the events immediately after the Civil War that prompted the Civil Rights Act of 1866 and other statutes adopted earlier in the session, saying that they were:

> * * * a simple act of justice to the negroes and poorer whites of the South, who had always been loyal to the Government * * * Whatever may be said against these measures, and much has been said, their sole object was to break down in the seceded States the system of oppression to which I have alluded.[104]

He went on:

> The President saw fit to veto these measures, supposing them to be unconstitutional. I never doubted the power of Congress to pass them. I never doubted that the Government would be disgraced if it failed to establish for the private citizen the muniments of freedom intended to be secured by them * * *
>
> * * *
>
> * * * The State courts are already deciding the "civil rights bill" to be unconstitutional. The validity of all laws must depend at last upon human judgment. Judges, even in the highest courts, are but mortals. Should the Supreme Court of the United States affirm the judgment of these inferior tribunals, the present period would be no better for the rights of the negro than that when the Supreme Court once before supposed he had no rights which the white man was bound to respect. Should such be the action of this tribunal, the problem would at once be presented, whether four million people can be peacefully held nominally free, but actually slave.[105]

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104. *Ibid.*, at 3034.

105. *Ibid.*, at 3035.

Section 5 of the Fourteenth Amendment is relevant because, as has been noted above, the Civil Rights Act of 1866 was reenacted as Section 18 of the Civil Rights Act of 1870[106] which read:

> *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.

It is by virtue of this section that this Court has held that Section 1982 finds its authority in the Fourteenth Amendment as well as the Thirteenth. *Buchanan* v. *Warley,* 245 U. S. 60, 78 (1917). That was plainly the intent of the sponsors of the bill. [107]

The debate on this bill, while it was devoted chiefly to the provisions dealing with the right of freedom to vote, reveals a very broad view of the powers of Congress under the "appropriate legislation" clauses of both the Fourteenth and the Fifteenth Amendments. Thus Rep. Davis, during the debate on the Conference report, said of Section 5 of the Fourteenth Amendment, "No broader language could be adopted than this with which to clothe Congress with power".[108] He went on:

> "Appropriate" means that which is necessary and proper to accomplish the end. Congress, then, is clothed with so much power as is necessary and what is proper.

106. 16 Stat. 144 (1870).

107. Cong. Globe, 40th Cong., 1st Sess. 3871, 3881 (1867).

108. *Ibid.,* at 3882.

A more detailed analysis of both amendments was made by Rep. Pool who insisted that, under both the Fourteenth and Fifteenth Amendments, Congress could reach the conduct of individuals:

> * * * It has been said that voting is a privilege; but this amendment recognizes it as a right in the citizen; and this right is not to "be denied or abridged by the United States, or by any State." What are we to understand by that? Can individuals abridge it with immunity? Is there no power in this Government to prevent individuals or associations of individuals from abridging or contravening that provision of the Constitution? If that be so, legislation is unnecessary. *If our legislation is to apply only to the States, it is perfectly clear that it is totally unnecessary, inasmuch as we cannot pass a criminal law as applicable to a State; nor can we indict a State officer as an officer. It must apply to individuals.* * * * But the word "deny" is used. There are various ways in which a State may prevent the full operation of this constitutional amendment. It cannot—because the courts would prevent it—by positive legislation, *but by acts of omission it may practically deny the right. The legislation of Congress must be to supply acts of omission on the part of the States.*
>
> The word "deny" is used not only in this fifteenth amendment, but I perceive in the fourteenth amendment it is also used. When the fourteenth amendment was passed there was in existence what is known as the civil rights bill, a part of which has been copied in the Senate bill now pending. * * *
>
> * * * And so, under the fourteenth amendment to the Constitution, * * * it is only when a State omits to carry into effect the provisions of the civil rights act, and to secure the citizens in their rights, that the provisions of the fifth section of the fourteenth amendment

would be called into operation, which is, "that Congress shall enforce by appropriate legislation the provisions of this article." [109] [Emphasis added.]

In the Senate, the spokesman for the bill, Senator Stewart, opposed the more limited House bill because, "It does not touch outsiders who interfere—mobs."[110] Senator Howard warned against a narrow construction of the "appropriate legislation" clauses in peculiarly prophetic terms." Referring to Section 2 of the Fifteenth Amendment which is virtually identical with Section 5 of the Fourteenth and even closer in language to Section 2 of the Thirteenth Amendment he said:

> It is a prohibition upon the two Governments, the Federal and the State Government, by which they are respectively disabled from passing any act by which this evil shall be created or encouraged. It does not, in terms, relate to the conduct of mere individuals, and a very "strict construction" court of justice might, as I can well conceive, refuse to apply the real principles of the amendment to the case of individuals who themselves, as mere individuals, and not as authorized by Governments or Government officers, shall undertake to deny or prevent to a colored man the exercise of his right of suffrage; and I have some fear, I confess that owing to the peculiar phraseology of this amendment some courts may give it that strict, and, in my judgment, narrow construction.[111]

Another supporter of the bill, Senator Oliver H. P. T. Morton of Indiana, specifically rejected the "state action"

109. *Ibid.*, at 3611.

110. *Ibid.*, at 3656.

111. *Ibid.*, at 3655.

limitation urged by opponents of the bill, saying, with respect to the Fifteenth Amendment (but his words are equally applicable to the Fourteenth):[112]

> I state the position [of the opponents of the bill] as being in conflict with that which we intended by that amendment, to place the colored man upon the same footing, with regard to suffrage, that the white man occupies, and to give to Congress the power necessary to enable him to enjoy it fully; *and that involves the exercise of the power upon individuals.* I repeat again, and it must be fresh in the recollection of most members of the Senate, that the debates upon the adoption of that constitutional amendment will show that it was adopted with that understanding and spirit. I never heard the construction that has been given to it in the argument on this bill, that it operated only upon States as municipal corporations and upon the United States. I never heard that position taken, I believe, throughout the long and interesting debate which took place on the passage of the amendment. I never heard it until today. [Emphasis added.]

In short, Congress was to have broad discretion to judge what legislation was necessary to assure equality and freedom, with power to reach private persons, "outsiders" such as "mobs." It could "go into any of these States for the purpose of protecting and securing liberty," and could "exercise—the power upon individuals" under the provisions of Section 2 of the Thirteenth and Section 5 of the Fourteenth Amendment. The contrary argument, urged by those who had opposed all three amendments from the first (the argument that was later upheld by the courts), that they "operated only upon States as municipal corporations and upon the United States," was rejected by those

112. *Ibid.*, at 3671.

who spoke for the bill as a last ditch effort to render the amendments ineffectual.

The decisions of this Court narrowly construing the post-Civil War civil rights acts on the basis of narrow interpretation of the Thirteenth and Fourteenth Amendments have been widely criticized as incorrect interpretations of the intent, purpose and language of those who adopted them. One of these critics, H. E. Flack,[113] who wrote 43 years after the adoption of Thirteenth Amendment, was a person not unsympathetic to the views which resulted in this narrow reading.[114] Flack examined the legislative history of the Fourteenth Amendment including the debates in Congress and newspaper reports concerning the debates in the ratifying states. He also studied the debates on the civil rights acts of the period. He said of the 1866 Act:

> There also seems to have been a general impression among the press that [N]egroes would, by the provisions of the bill, be admitted, on the same terms and

113. Flack, *The Adoption of the Fourteenth Amendment* (1908). Flack made little attempt in his book to conceal his sympathy with the Democrats and President Johnson as against the Radical Republicans.

Flack's reputation as a scholar does not rest on this work alone. He had received not only BA and MA degrees from Wake Forest College but also a Ph. D. from John Hopkins and subsequently received his LL.B. from the University of Maryland (*Who's Who in America*, Volumes 6 and 10). He was the author or editor of a number of other books including: *Spanish-American Diplomatic Relations Preceding the War of 1898*, Baltimore (John Hopkins Press, 1906) and *Taft Papers on League of Nations*, 1920. He prepared the Annotated Code of the General Laws of Maryland published in 1951 and was also responsible for a number of Codes of Ordinances for Baltimore and various Maryland counties. He was a member of the American Political Science Association, the National Baltimore Municipal League and Phi Beta Kappa.

114. See authorities cited by Mr. Justice Goldberg in his concurring opinion in *Bell* v. *Maryland*, 378 U. S. 226, 286 (1964).

conditions as the white people, to schools, theaters, hotels, churches, railway cars, steamboats, etc.

He commented that this impression was "clearly warranted, both by the context of the bill and by the declarations of some of its supporters.[115]

Commenting specifically on the fact that Representative Bingham (as well as other supporters of the bill) often gave various forms of official discriminatory action as examples of what the bill would reach, Flack said:

> While these statements might seem to justify the conclusion that Congress was not empowered to act until the States had actually passed discriminating or unconstitutional laws, Mr. Bingham evidently did not intend to leave that impression, for he stated specifically at this time that no State ever had the power, by law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privilege of any citizen though stating that this had been done, and that without remedy * * * This clearly shows that he intended that Congress should have the power to pass laws declaring what rights should be secured to the citizens. Anyway, it matters little whether Congress was to exercise the power before the States had denied those privileges, either by acts of omission or of commission, since Congress was unquestionably empowered to define or declare, by law, what rights and privileges should be secured to all citizens.[116]

Flack concludes his analysis of the Fourteenth Amendment by saying:

> It also seems quite evident that it was intended to confer upon Congress, by the fifth section, the power to

115. Flack, *supra*, fn. 113, at 45.

116. *Ibid.*, 80-81.

determine what were the privileges and immunities of citizens, thereby being able to secure equal privileges and immunities in hotels, theatres, schools, etc. * * *[117]

Flack concluded his book as follows:

However futile were the efforts of Congress to give vitality to the Amendment as interpreted by itself and by those who had most to do with its drafting and adoption, the fact remains that nearly all the evidence goes to sustain the position of Congress as far as the question of power and authority is concerned. [The evidence shows that] according to the purpose and intention of the Amendment as disclosed in the debates in Congress and in the several state legislatures and in other ways, Congress had the constitutional power to enact direct legislation to secure the rights of citizens against violation by individuals as well as by the States.[118]

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117. *Ibid.*, at 96-97.

118. *Ibid.*, at 277. Flack's study received authoritative approval at the time of its publication. A book review appearing in the *American Historical Review*, 14:625, April 1909, said:

> He makes it perfectly clear that a number of the strongest and most influential supporters of the amendment repeatedly described its meaning and effect as precisely those which the Supreme Court has steadfastly refused to give to it. Dr. Flack, is, however, too good a lawyer and too exact an historian to say that the Supreme Court was wrong. He is content to leave to the reader the deductions that may be drawn from the clear and scholarly narrative.

The review in the *Annals of the American Academy of Political and Social Sciences*, 33:471, March 1909, said:

> This is an excellent study of the purpose of the 14th Amendment. The conclusion is not new—that the Supreme Court in its later interpretations of the amendment nullified what the almost unanimous belief of national and state legislatures as well as of the people at large as to what change had been made in our constitution. Mr. Flack has presented in detail the historical evidence justifying this conclusion.
>
> The discussion begins with the Freedmen's Bureau and Civil Rights bills, then the amendment itself, prompted by the same

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This Court, close to the time it was striking down the Civil Rights Act of 1875 in the Civil Rights Cases, *supra*, at 32-34, discussing the fifth section of the Fourteenth Amendment, noted that in the Slaughter-House Cases, 16 Wall 36 (1873), the Court, referring to the Fourteenth Amendment, had said that "if the States do not conform the laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation." *United States* v. *Harris*, *supra*, at 638.

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motives as these bills is attacked. From the debates of Congress it is shown that the amendment was in the strictest sense a log-rolling measure, that the motives for the various clauses were largely political and that the section on citizenship—by all odds the most important and the only one which has had a permanent effect upon our government received but little discussion. It seems to have been assumed by Congress that Negroes were already citizens and that the statement in the amendment was declarative only. The real object of the amendment was affirmative guarantee of civil rights. It was to remove all doubts as to the constitutionality of the Civil Rights bill, to make the first eight amendments binding on the states and incidentally to declare who were citizens of the United States.

In his discussion of the amendment before the people and before the state legislatures Mr. Flack shows that the view Congress held was general. The majority thought Congress was to have power to define what were the rights of citizens which the United States could protect and the opposition decried the change as one which would reduce the states to the position of counties.

The last chapter discusses the Congressional interpretations placed upon the amendment just after its adoption. The evidence given as to their purpose by those who framed the amendment bears out the conclusion from the sources previously discussed.

Mr. Flack is to be congratulated on the way he has handled his subject. He has confined himself strictly to the subject in hand and has given us the best compilation of the historical evidence as to the purpose of the 14th amendment which is now available.

See also, the review in the weekly newspaper *Outlook*, 91:774, April 3. 1909.

And in *Strauder* v. *West Virginia*, 100 U. S. 303 (1879), this Court, in striking down a conviction of a colored man for murder because the jury that tried him had, under West Virginia law, been one for which no colored man was eligible, referred to Sections 1977 and 1978 of the Revised Statutes, portions of Section 1 of the Civil Rights Act of 1866, as the basis for Section 641 of the federal statutes which barred denial of the equal civil rights of any citizen in any state court, and said of sections 1977 and 1978, "This act puts in the form of a statute what had been substantially ordained by the constitutional amendment. It was a step towards enforcing the constitutional provisions. Sect. 641 was an advanced step, fully warranted, we think, by the fifth section of the Fourteenth Amendment." (at 312).

This Court has had occasion recently to give consideration to the authority of Congress to enact legislation against private action under Section 5 of the Fourteenth Amendment. In *United States* v. *Guest, supra,* the Court considered the constitutionality of the charge that the defendants, members of the Ku Klux Klan in Georgia, had conspired in violation of federal law to intimidate Negroes in the exercise of a number of federal rights including the right to equal protection created by the Fourteenth Amendment. The opinion of Mr. Justice Stewart for the Court construed the pleadings as alleging an involvement of state action in the defendants' conspiracy (at 755-57). He was joined in his opinion by Justices Harlan and White. But the remaining six members of the Court, while concurring in the result, indicated acceptance of the view that Congress had power under Section 5 of the Fourteenth Amendment to enact legislation directed against conspira-

cies by private individuals interfering with the exercise of rights protected under the amendment. Mr. Justice Brennan, in his concurring opinion, which was joined in by Mr. Chief Justice Warren and Mr. Justice Douglas, faced the constitutional question, rejecting the view in the Court's opinion that there was state action. The three justices took the position that the indictment was constitutional under Section 5. They said:

> Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, Section 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment; and Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection (at 782).

The remaining three justices, Clark, Fortas and Black, accepted Mr. Justice Stewart's construction of the indictment as alleging state action but went on to state their belief that "the specific language of Section 5 empowers Congress to adopt laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." (at 762) Since the Civil Rights Act of 1870 was enacted after the Fourteenth Amendment pursuant to the congressional powers of Section 5 thereof and it reenacted the 1866 Act, this doubly established the constitutional power of Congress to enact it.

Hence *Guest, supra,* makes it clear that the statute here involved, the 1866 Act which is the basis of Section 1982,

was twice a valid exercise of the constitutional power of Congress, once under Section 2 of the Thirteenth Amendment and again under Section 5 of the Fourteenth Amendment when it was reenacted in 1870, after the adoption of that amendment.[119]

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119. No contention is advanced herein that the Civil Rights Act of 1866 is and would be constitutional under the privileges and immunities clauses of Article IV, Section 2 of the Constitution and Section 1 of the Fourteenth Amendment, or under the clause guaranteeing a republican form of government to the States of Article IV, Section 4 or the commerce clause of Article I, Section 8, clause 3 coupled with the power to make all laws necessary and proper for executing the specific powers, in clause 18 of the same article. No such contentions are made only because it is believed unnecessary since the more limited and novel arguments made in this brief require the setting aside of no precedents, only the clarification of certain erroneous dicta as in *Hurd* v. *Hodge, supra,* and *Corrigan* v. *Buckley, supra,* at 18 and in *Hodges* v. *United States, supra,* at 18-20. The contentions made herein are ones which have never, either on their facts or on the law, been dealt with by this Court.

But each of the contentions mentioned above has been advanced by scholars of the law with arguments which carry great weight. Professor Chester James Antieau recently advanced an interesting theory to support application of the "privileges and immunities" clause of Article IV, Section 2 and of Section 1 of the Fourteenth Amendment to private discriminatory action in an article cited above entitled *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four* in 9 William and Mary Law Review 1. And an excellent Student Note entitled *Theories of Federalism and Civil Rights* in 75 Yale Law J. 1007 presents a persuasive rationale for federal protection of fundamental civil rights based on the "republican form of government guaranty of Article IV, Section 4 coupled with a reference to the danger to that form of government arising from granting absolute power to a temporary majority faction discussed by James Madison in The Federalist No. 10. And Laurent B. Frantz presents a strong clear rationale for the applicability of Section 1 of the Fourteenth Amendment to private action in the *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts* in 73 Yale Law J. 1351 (1964).

The constitutionality of the Civil Rights Act of 1866 may also rest on the commerce clause of Article I coupled with clause 18.

The commerce clause gives Congress plenary power to protect

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interstate commerce, *Gibbons* v. *Ogden*, 9 Wheat 1 (1824). It is not necessary that when Congress exercises this power, its sole motive be to protect commerce. It may act for moral reasons. *Heart of Atlanta Motel* v. *United States*, 379 U. S. 241 (1964). And its power is not limited to mere regulation of persons or goods crossing state lines. Any activity which affects interstate commerce may be the subject of congressional legislation, even if the persons or goods engaged in the activity are not or may never be in transit. *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937); *Katzenbach* v. *McClung*, 379 U. S. 294 (1964).

Therefore, the mere fact that Congress did not explicitly state that the 1866 Act was an exercise of its commerce power should not defeat the statute's constitutionality. An examination of the *actual goals* of the 1866 Act will show that they are similar to those of the Civil Rights Act of 1964. Both acts seek elimination of broad patterns of existing racial discrimination which seriously affect interstate commerce.

In hearings on the proposed 1966 Civil Rights Act, then Attorney General Katzenbach stated that:

> * * * The construction of homes and apartment buildings and the production and sale of building materials and home furnishings take place in or through the channels of interstate commerce. When the total problem is considered, it is readily apparent that interstate commerce is significantly affected by the sale even of single dwellings, multiplied many times in each community.
>
> The housing industry last year represented $27.6 billion of new private investment. This expenditure on residential housing is considerably more than the $22.9 billion which all American agriculture contributed to the gross national product in 1965. Forty-one million tons of lumber and finished woodstock were shipped in the United States in 1963, and 43 percent of it was shipped 500 miles or more. *Hearings on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170; Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 89th Cong., 2d Sess. pt. 1*, at 82-83 (1966). [Hereinafter cited as *1966 Hearings*].

It is readily apparent that racial discrimination in the sale of homes reduces the number of new houses built and otherwise impedes the movement of building supplies across state lines. It also discourages the interstate movement of individuals. *1966 Hearings* at 86. In short, it adversely affects interstate commerce.

H. The Reenactment of the Civil Rights Act of 1866 by Section 18 of the Civil Rights Act of 1870

The reenactment of the Act of 1866 by Section 18 of the 1870 Act probably served as the basis for the trial court's statement in the decision in the trial court that Sections 1981 and 1982 "are directed toward governmental action" (A. 17a). The trial court cited *Hurd* v. *Hodge, supra,* and *Buchanan* v. *Warley, supra,* even quoting from the latter case to the effect that the "Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to *qualify* and entitle a colored man to acquire property without state legislation discriminating against him solely because of color." It is clear from the foregoing that the basis of the reading of Section 1982 as being limited to state action is based on its reenactment after the adoption of the Fourteenth Amendment. But such a reading ignores the expressed intent of the Congress which adopted the 1866 Act over President Johnson's veto and followed it up by approving the Fourteenth Amendment and submitting it to the states for ratification. The fact is that an examination of the legislative history of the Fourteenth Amendment makes it clear that the authors and the two-thirds majority in Congress that passed that amendment did so to place the 1866 Act beyond the possibility of repeal by any later Congress.[120] They saw the amendment as an emphatic reassertion of the civil rights secured by the 1866 Act, not as a limitation on that Act preventing federal protection of those rights against private individuals. The Congress which approved the amendment did so

120. See, Gressman, *supra,* fn. 10, at 1328-30.

to remove all doubt about the constitutionality of the 1866 Act, doubt which they did not share. As Rep. Thomas D. Eliot said:

> I voted for the civil rights bill, and I did so under a conviction that we have ample power to enact into law the provisions of that bill. But I shall gladly do what I may to incorporate into the Constitution provisions which will settle the doubt which some gentlemen entertain upon that question.[121]

Professor Mark De Wolfe Howe, discussing this question, reached the following conclusion:

> I have not seen any evidence that when the Fourteenth Amendment was adopted its framers intended to take back any of the congressional authority which the Thirteenth Amendment had created—the authority that is, to deal with private efforts to perpetuate the inequities born of slavery. Nor is there, in my judgment, persuasive evidence to suggest that the congressional power specifically granted in the Fourteenth Amendment to enforce its prohibitions of State action was intended merely to authorize legislative condemnations of practices that the amendment's own prohibitions outlawed. I see very little reason, in other words, to believe that the Fourteenth Amendment denied Congress the power to condemn private action designed either to impair the privileges of the colored citizens of the United States or to prevent the States from safeguarding the liberty and equality of Negroes.[122]

Professor Howe, discussing the views of the authors and supporters of the Fourteenth Amendment went on to say:

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121. CONG. GLOBE, 39th Cong., 1st Sess. 2511 (1866).

122. See, Howe, *supra*, fn. 14 at 50-51.

> We know that its draftsmen were predominantly, if not wholly concerned with assuring the total fulfillment of the promises of the Thirteenth Amendment and of the equality act of 1866.[123]

It would be ironic if the effort of the Congresses which adopted the Fourteenth Amendment and the Civil Rights Act of 1870 to give greater strength and emphasis to what Professor Howe so aptly calls the "equality act of 1866" were now read and held to limit that act to state action and thereby to prevent the federal government from dealing with the most serious remaining inequality arising from our history of accepting and permitting Negro slavery, racial segregation and exclusion in housing.

The reading of the 1870 reenactment of the 1866 Act as limiting its object to state action also ignores a fundamental canon of statutory interpretation that the reenactment of a statute effects no change in the law but merely continues the original law in force.[124]

I. The Relationship of Section 1983 to Section 1982

The trial court took the position that Section 1983 of Title 42 of the United States Code "alone of the civil rights statutes, other than the Civil Rights Act of 1964, provides for a right of action" (A. 18a). The trial court went on to find that Section 1983 may be resorted to only where there is state action and concluded that since it found no state action, petitioners were without remedy against the discriminatory denial of their right to purchase the real property in question.

123. *Ibid.*, at 52-3.

124. 50 Am. Jur., *Statutes*, Sec. 441.

It is respectfully submitted that there is no authority to sustain the contention that the sole remedy for violation of Section 1982 is that contained in Section 1983. If, as has been demonstrated above, Section 1982 was based on the Thirteenth Amendment and protected the right to purchase or lease real property without discrimination based on race, a vestige of slavery, against all persons, private as well as those acting under the authority of the state, such a limitation of remedy would make Section 1982 practically meaningless. And such a result would be to assume that Congress elected to enact a nullity in violation of a basic canon of statutory construction.

From the very beginnings of Anglo-American jurisprudence it has been a maxim of canon law that "Remedies for rights are ever favorably extended."[125] Courts of equity have always taken as a basic principle that wrongs must be remedied:

> The maxim that equity will not suffer a wrong to be without remedy, is probably the most important of the principles which are addressed to the court or chancellor.[126]

In *Colorado Anti-Discrimination Commission* v. *Case*, 380 P. 2d 34 (Colo. 1962), the Supreme Court of Colorado, upholding the constitutionality of the Colorado Fair Housing Law, gave support to the foregoing doctrine saying:

> The constitution of the state and the nation recognize unenumerated rights of natural endowment. These God-given rights should be protected from infringe-

125. 18 VINER'S ABRIDGEMENT 521; COKE ON LITTLETON, 153 a, b.

126. 19 Am. Jur., *Equity*, Sec. 451.

ment or diminution by any person as well as any department of government. It is the solemn responsibility of the judiciary to "fashion a remedy" for the violation of a right which is truly "inalienable" in the event that no remedy has been provided by a legislative enactment at 40.

It is submitted that the foregoing doctrine must be followed by the federal courts if Section 1982 is to be prevented from being rendered a nullity.

It is also noteworthy that Section 3 of the Civil Rights Act of 1866 specifically refers to civil suits "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section" of the act and grants to the district courts of the United States cognizance of all such causes. Hence the authors of the Act specifically authorized and contemplated enforcement of those rights, including those protected by Section 1982, by means of civil suit. And even though this provision was later omitted from subsequent codifications of the federal laws, such omission cannot serve to extinguish the right to enforcement of those rights by civil suit. *District of Columbia* v. *Thompson Co.*, 346 U.S. 100 (1953).

Section 1983 is derived from the Civil Rights Act of 1871 which was subtitled "An Act to enforce the Provision of the Fourteenth Amendment to the Constitution of the United States and for other Purposes." And the original act specifically provided that proceedings instituted under it were to be prosecuted in the district or circuit courts of the United States "with and subject to the same rights of

appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six * * *" Section 7 of the 1871 Act specifically provided that "nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto; * * *" This provision, it is submitted, completely negates any inference that the remedies in Section 1983 are limitations on the rights established in Section 1982 and on the propriety of bringing suit in the United States District Courts for violation of those rights.

POINT II

Assuming, *arguendo*, that Section 1982 is applicable only where there is state action, the discrimination suffered by petitioners results from state action and they are therefore entitled to relief under the equal protection clause of the Fourteenth Amendment as they would be under the statute.

It is well established that some form of state action which results in a denial of equal protection is required for invocation of the first section of the Fourteenth Amendment. Civil Rights Cases, *supra*; *Hodges* v. *United States*, *supra*. However, it is equally well established that the concept of state action has not been reduced to an exact formulation with clearly defined limits. It remains imprecise and capable of application to an extensive variety of situations. E.g., *McCabe* v. *Atchison T. & S.F. Ry.*, 235 U. S. 151 (1914) (State authorization to discriminate is no less state action than state imposed discrimination); *Buchanan* v. *Warley*, *supra* (Discriminatory zoning ordinances are in-

valid); *Smith* v. *Allwright,* 321 U. S. 649 (1944) and *Terry* v. *Adams,* 345 U. S. 461 (1953) (White primaries held to be functionally equivalent to black disenfranchisement); *Marsh* v. *Alabama,* 326 U. S. 501 (1946) (Company-owned town is subject to same constitutional prohibitions as municipal town); *Shelley* v. *Kraemer,* 334 U. S. 1 (1947) (State participation found in judicial enforcement of racial restrictions determined by private parties in agreements); *Cooper* v. *Aaron,* 358 U. S. 1 (1958) (Members of school board and superintendent of schools are agents of the state); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (1961) (State lessee may not exclude Negroes from his restaurant); *Anderson* v. *Martin,* 375 U. S. 399 (1964) (Racial labelling of candidates on ballots invalidated because it encouraged and assisted discrimination); *Griffin* v. *Maryland,* 378 U. S. 130 (1964) (Combination of state and private powers bring constitutional guarantees into operation); *Evans* v. *Newton,* 382 U. S. 296 (1966) (Provision of park services is municipal in nature); *Reitman* v. *Mulkey,* 387 U.S. 369 (1967) (The right to discriminate without interference of any governmental organ of the state may not be embodied in the state constitution).

The need for a flexible principle of determining what is state action is demonstrated by these and other such cases involving the requirements of the Fourteenth Amendment. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority, supra* at 722.

The facts and circumstances of the instant case demonstrate numerous ways in which the State is involved in

the development of the Paddock Woods subdivision. Respondents are themselves licensed and incorporated by the State of Missouri and utilize the services of other state licensees, and of state and municipal offices (including the Building Commissioner, Planning Commission, Recorder of Deeds, Sewer District, County Engineer and the Highway Department). They have also been delegated the right and power to control and regulate the community during and after its construction by means of covenants and quasi-taxing power, to assess and impose liens against residents for community-wide services (A. 7a-9a).

In brief, the respondents are engaged in the construction and governing of a self-contained residential community. They are carrying out state functions similar in nature to the varied powers of a municipality. In *Buchanan* v. *Warley, supra,* this Court held that racially discriminatory zoning ordinances were invalid under the Fourteenth Amendment. Thus government enforced segregation in housing was ruled unconstitutional. And of course an attempt to achieve the same result indirectly suffers from the same constitutional infirmity. See *Burton, supra,* at 725. The state can not permit another to perform one of its vital functions in a discriminatory manner.

Marsh v. *Alabama, supra,* is one of the cases in which the Court responded in terms of reality to the principle of state action and is analogous to the instant case. In *Marsh* the state attempted to impose criminal punishment on a person who distributed religious literature on the premises of a company town against the wishes of the town's management. Mr. Justice Black stated for the ma-

jority that the corporation's property interests do not settle the question (at 505). He noted, "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." By way of illustration he pointed out that if facilities are built and operated primarily for public benefit and their operation is essentially a public function, they are subject to the limitations to which the state is subject and cannot be operated in a discriminatory manner (at 506).

Similarly, in the case at bar the respondents whose project is freighted with many aspects of delegation to it of state authority may not discriminate against prospective Negro purchasers in offering the homes of the subdivision for sale to the general public. The historic decision of *Brown* v. *Board of Education, supra,* is now generally accepted as establishing the constitutional right of Negroes to be free from discrimination in the life of the community. See, *e.g., Watson* v. *City of Memphis,* 373 U. S. 526 (1963). This personal right ensures that every Negro is an equal member of the general public. And where, as here, homes are built to be sold to members of the public and the essentially public function of operating a community is undertaken by private individuals, the Fourteenth Amendment requires that, in carrying out this public function, those private individuals shall not discriminate against Negroes, who must be given the same right to purchase real property as is given to other members of the general public.

In *Marsh, supra,* the majority also stated that "whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free." (at 507). Just as the managers of a company town can not curtail First Amendment rights of those entering the town because they are bound by the Fourteenth Amendment, the respondents can not curtail Fourteenth Amendment rights of members of the public who have an interest in the functioning of the community in a manner consistent with the equal protection of the law.

Marsh, supra, cannot be distinguished from this case on the basis of the fact that the former involved the attempted application of a criminal statute. The majority opinon, in addition to holding that a criminal penalty could not be imposed, also stated that the mere circumstance of private ownership is not sufficient to permit the community to be *governed* in a manner which restricts constitutionally protected liberties (at 509). In *Marsh, supra,* this Court was impressed with the fact that the town had all of the outward characteristics of any other American town (at 502). In this case the Court is dealing with a suburban community that is similar to any other suburban political subdivision. And state action is further demonstrated by the fact that the creation of public school segregation and the control of political representation from the area depends on the residential pattern established in the community by respondents. If Negroes are systematically excluded from suburban housing developments, a necessary consequence is their exclusion from areas of in-

creasing political representation and the systematic exclusion of their children from suburban school districts.

The specific factors on which most of the cases that found there was state action can be distinguished are relatively unimportant. In this area this Court must deal in each case with new situations for which there is no settled precedent or doctrine.[127]

However, one common thread that runs through these cases is a recognition that private individuals can by enfranchisement or regulation by the state take on the carrying out of a state function and thereby become subject to constitutional limitations imposed on the state. *Public Utilities Commission* v. *Pollak*, 343 U.S. 451 (1952).[128] The instant case illustrates such an enfranchisement and regulation. Viewing the totality of respondents' scheme for building their community, the only conclusion that can be drawn is that here there is "action" by the state.

The state imposes strict requirements on the issuance of real estate licenses and regulates the operation of that profession in many aspects. The licensing and regulation of real estate brokers and plumbers and contractors of various sorts are required to protect the public welfare, to guard the public against shoddy business practices and defective workmanship, and to prevent results dangerous to the entire community endangering the public health and well being. In certain instances the state will not permit

127. See, *Burton*, *supra*. See also, Black, *Foreword*: *"State Action", Equal Protection, and California's Proposition 14*, 81 Harv. Law Rev. 69, 87-89 (1967).

128. See also, Williams, *The Twilight of State Action*, Tex. Law Rev. 347, 350 (1963).

individuals to be licensed because of either moral or professional shortcomings. Having undertaken to protect the public welfare in this manner, the state has made such licensing an aspect of its operation. Licensees act with the approval and sanction of the state. If a person who has been licensed by the state discriminates against a member of the general public because of race, the exercise of these powers flowing from the license is a form of state action under the Fourteenth Amendment. The action of the state in granting the license is a necessary condition for the carrying out of this particular act of discrimination. To insure equal protection of the laws a state must ensure that its licensees do not discriminate. See, *Garner* v. *Louisiana,* 368 U. S. 157, 176 (1961), Douglas concurring; *Lombard* v. *Louisiana,* 373 U. S. 267, 277, 283 (1963), Douglas concurring.

In *Burton* v. *Wilmington Parking Authority, supra,* this Court held that a restaurant operated by a private owner under lease in a public building was engaging in discriminatory state action in violation of the equal protection clause when it refused to serve Negroes. The majority looked to the sum of the surrounding circumstances, and found that the private business there had become sufficiently involved with the public interest and with the activities of the state, to make its activity subject to Fourteenth Amendment limitations.

The land and building were publicly owned and maintained and dedicated to public use. The structure had been erected with public funds and for the public convenience (at 723-24). "By its inaction, the Authority, and through

it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination." (at 725).

The instant case is similar to *Burton* in that the State of Missouri has so far placed itself in a position of interdependence with respondents that it must be considered a joint participant in the discriminatory activity. In this regard certain language from the separate opinion of Mr. Justice Douglas in *Reitman* v. *Mulkey, supra,* at 384-5, is highly instructive:

> Zoning is a state and municipal function. See Euclid v. Ambler Realty Co., 272 U.S. 365, 389 et seq., * * *; Berman v. Parker, 348 U.S. 26, 34-35. * * * When the State leaves that function to private agencies or institutions who are licensees and who practice racial discrimination and zone our cities into white and black belts or white and black ghettoes, it suffers a governmental function to be performed under private auspices in a way the State itself may not act. The present case is therefore kin to Terry v. Adams, 345 U.S. 461, * * * where a State allowed a private group (known as the Jaybird Association, which was the dominant political group in county elections) to perform an electoral function in derogation of the rights of Negroes under the Fifteenth Amendment.
>
> Leaving the zoning function to groups who practice racial discrimination and are licensed by the States constitutes state action in the narrowest sense in which Shelley v. Kraemer, supra, can be construed.

The state here has acquiesced in the discriminatory operation by Affred H. Mayer Co. of its zoning and other governmental functions. And if a state must ensure that its lessees in a public facility operate in a manner consistent with

the Fourteenth Amendment, there is no reason to excuse it from the same duty with respect to its licensees who are not only regulated but are delegated the right to exercise governmental functions in the public interest. The *Burton* decision is of added significance in this area because it implicitly overrules whatever inferences to the contrary may flow from the case of *Dorsey* v. *Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E. 2d 541, (1949) cert. den. 339 U.S. 981 (1950).[129]

When a state permits a private party to carry out a function which is essentially that of the state or a political subdivision, then the carrying out of that function is subject to all of the requirements of the Fourteenth Amendment. This is true whether or not the state retains any power to direct the carrying out of that activity and whether or not the state has any property nexus of any kind with the "private" party.

> It would scarcely be argued that a city could establish water works, sewerage systems, flood walls, roads and other public works * * * and then lease them to private operators, who would then be allowed to discriminate * * * *Lawrence* v. *Hancock*, 76 F. Supp. 1004, 1009 (S. D. W. Va. 1948).

If we assume, as we must, that it is not the lease that counts, but the function carried out by the lessee, then this decision applies even if the facilities are owned outright by a "private" person. In fact, it is not possible to imagine a situation, at this stage of development of the law of racial discrimination, where "water works, sewerage systems, flood walls, roads and other public works" could be consti-

129. See, Black, *supra*, fn. 127, at 85.

tutionally operated in a racially discriminatory manner regardless of who technically owned the facilities. If one is not allowed, "private" party or not, to run a water works in a racially discriminatory manner, then certainly one will not be allowed, "owner" or not, to run an entire community in a manner violative of the Fourteenth Amendment.

Petitioners have alleged facts in their complaint sufficient to demonstrate that the respondents' development for purposes of the Fourteenth Amendment is in fact a town (A. 7a-12a). The respondents supply numerous services which would otherwise have to be supplied by local government. The respondents' development is located in the unincorporated portion of St. Louis County. This portion of the county is covered by a comprehensive Land-Use Plan, "Guide for Growth," which has been adopted by the St. Louis County Planning Commission, and the respondents' development was located according to the principles governing the growth of the county which appear in that plan. Furthermore, respondents' development was approved by the Planning Commission and by the County Council (A. 8a). In order for a development to be approved it is considered as an entity, and is approved only if its plans have the approval of the Planning Commission and the County Council.

As part of the approval process legal obligations are created which reinforce the conclusion that the privately owned development is a "town". The common recreational area is conveyed to trustees, appointed in the first instance by respondents, who "represent" the development

and who hold and administer it for all residents in the development. Trustees are also empowered to provide garbage collections and other community services. A "municipal" golf course, open exclusively to residents and their guests is provided. Finally, the developer must impose covenants on the use of land within the development which, under the law of Missouri, supersede and take the place of the regulations of the zoning ordinance which would ordinarily control the use of property within this area.

In other words, not only were the creation and maintenance of sanitary, recreational and other community facilities a function and responsibility of government, delegated to respondents, but the very responsibility for zoning and community planning of the tract was affirmatively delegated by the government to them. This was exactly, in the words of the Fourth Circuit,

> * * * fulfillment by a private body of a "state" function pursuant to an extensive state plan. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 959, 969 (4th Cir. 1963), cert. denied, 376 U. S. 938 (1964).

And it is a state function which the state certainly could not carry out in a discriminatory manner. *Buchanan* v. *Warley, supra.* It is not reasonable to allow the state's delegate to discriminate on the basis of race, insulated from the Fourteenth Amendment, to do what the state, itself, could not.

It should be noted that with respect to many of these functions, the state has the power but not the duty to act. But on the basis of this analysis, the key question is not what is the duty of the state, but what the state does. Certainly no state has a duty to conduct a primary election. And yet when primary elections or pre-primaries are held,

even by private organizations, they are subject to the Fourteenth Amendment. See *e.g., Terry* v. *Adams, supra.*

In like manner, it is impossible to argue that a state has a duty to furnish hospital care, or swimming pools, or golf courses, or parks or any of the myriad activities which have been held "state action" despite private operation and ownership. But since these activities were government activities in the locality where they occurred, the state was not permitted to allow them to be carried on in a discriminatory manner, even when the state turned them over to private hands.

Thus, in the instant case, the state had no duty to turn every community into a municipal corporation, but when it allowed respondents to create a "town" and to carry out governmental functions in so doing, the carrying out of those functions is subject to the Fourteenth Amendment and must be carried out in a non-discriminatory manner.

If the respondents' community were an incorporated village, and there were a village ordinance forbidding sale of real property to Negroes, that ordinance would be invalid. *Buchanan* v. *Warley, supra.* If the area of the respondents' community were not politically incorporated, but all of the individuals who owned land in it agreed with each other that no one should sell his land to a Negro, that agreement could receive no sanction or enforcement by the state under the Fourteenth Amendment. *Shelley* v. *Kraemer, supra.* If the respondents' community were closed to persons coming into its streets attempting to exercise their right of free speech this would be improper under the First and Fourteenth Amendments. *Marsh* v. *Alabama, supra.*

It is respondents' position nonetheless, that what cannot be done by statute, and cannot be done by covenant, and cannot be done with respect to freedom of speech by even an absolute owner of a community, can be done by the absolute owner of a community in disregard of the equal protection clause of the Constitution. Such a contention cannot stand.

In summary, it is the position of the *amici* that, in addition to all the services which the various agencies of the State perform for respondents, the State is involved with them in a fundamental way; that is, they are actually carrying out governmental functions of the State which makes their action "state action" subject to the Fourteenth Amendment. The business of the respondents is not only "affected with the public interest," but for the residents and prospective residents of Paddock Woods, their business is equivalent to their local government. It is entirely inconsistent with the letter and spirit of the Fourteenth Amendment for a State to permit its citizens to be segregated on the basis of race in living areas by the mere expedient of turning its authority and responsibilities over to private persons. To hold that the Fourteenth Amendment does not apply to a situation such as is here under consideration is to hold that the State can avoid its responsibilities to all its citizens by subjecting them to the control and authority of a private individual or corporation as their municipal overlord rather than the control and authority of a regular publicly elected and controlled municipal government. The fact that in practice the State has done exactly this, confining its Negro citizens to the regularly established city and town governments while

allowing private developers to create and maintain segregated residential towns in the suburbs from which persons are excluded solely on the basis of race, does not make the practice either lawful or constitutional. It is in fact a clear evasion of the law of the land as embodied in the Fourteenth Amendment. It is submitted that this Court should not permit the practice of segregation in communities to be continued any longer through the fiction that it is the result of "voluntary" private action when in reality it is municipal action possible only with the direct permission and assistance of the State government and its agencies.

Conclusion

The decision of the court below dismissing the complaint should be reversed.

Respectfully submitted,

SOL RABKIN
National Committee Against Discrimination in Housing

ROBERT L. CARTER
National Association for the Advancement of Colored People

JOSEPH B. ROBISON
American Jewish Congress

ARNOLD FORSTER
Anti-Defamation League of B'nai B'rith

Attorneys for Amici

ABRAHAM H. FOXMAN
PAUL HARTMAN
HAROLD D. SHAPIRO
BEVERLY COLEMAN
ALEXANDER KOLBEN
Of Counsel

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